

THE INDIAN CONTRACT ACT 1872

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Volume I



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Preface

The primary object of this treatise is to provide the practitioners in law with a statement of the general principles of the Indian law of contract under the Indian Contract Act, 1872, and with discussions of the many controversial points in this branch of the law, on the basis of decided cases. This task on the part of the author has in a large number of cases led him to differ from the most distinguished judges, jurists, and text-writers of the country as well as of England. In this task, the author obviously cannot claim that he is right in all, or nearly all, cases and, therefore, to begin with, has to place himself at the disposal of the learned members of the Bar, the learned judges of the Hon'ble the High Courts of the several States and those of the Supreme Court of the land, for an eventual evaluation by them of his views as expressed in the present treatise. The author has relied more on decided cases than on academic dissertations as appearing in the several legal journals. Most of the leading cases have, however, been gathered by him from the *fontes*, and they will thus serve as a reliable guide on the topics covered. The Indian decisions as well as the English have been exhaustively noted under the respective Sections of the Indian Contract Act, 1872, and under the respective heads. In his zeal in picking up judicial decisions, the author may sometimes be found to have been guilty of repetition. Utility to the practitioner may perhaps be the only excuse for such repetition. An historical background of the Indian Contract Act, 1872, has been given with a view to acquainting the reader with what had gone before the present Act came into force on the 1st day of September, 1872. The operativeness of the English law in India in the last three hundred years as well as at present has also been discussed in the course of the treatise.

While making an attempt to render the text *readable*, the author has given an explanatory treatment to all the important concepts in the law of contract and has spared no pains in his exploiting the sources in order to enable the advanced student of the law of contract in India to have in two volumes all that he probably requires for a mastery over his subject. American case law has been avoided as far as it could be. An analytical and organic approach to the subject did not allow the presentation of any ill-assorted digest of the case law on a global scale. Any haphazard dabbling in American case law did not either appear permissible. The House of Lords, the Judicial Committee of Her Majesty's Privy Council exercising its jurisdiction beyond the seas, and the Supreme Court of India appeared adequate as the sources of the law, in addition to the provisions of the Indian Contract Act, 1872, itself.

The author has specially benefited from Cheshire and Fifoot, *Law of Contract*, 5th edition, 1960, and 6th edition, 1964; Hanbury, *Modern Equity*, 8th edition, 1962; and *Bowstead on Agency*, 12th edition, 1959. The pattern of the older classical texts of the English law of contract has not been followed,

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and the present treatise has been confined mostly to the leading cases on the subject, and this treatment will render it, it is considered, more useful for everyday practice of the law. Various other sources have, however, been occasionally made use of in course of the treatise.

The author has examined the several recommendations as well as the omissions made by the Setalvad Commission for the proposed amendments of the Indian Contract Act, 1872. The attention of the Ministry of Law (Legislative), Government of India, and of the Parliament will be drawn for the favour of their perusal of this examination by the author before any revision of the law of contract is undertaken by the competent authorities. It will be noted in this connection that the author did not discuss those provisions of the recommendations of the Indian Law Commission that seek to incorporate in the Indian Contract Act, 1872, as statutory provisions, the modern case law on the points covered. The Proposals as shown in the form of draft amendments in Appendices I and II to the Thirteenth Report of the Commission have, however, been reproduced as Appendix I to the second volume of the present text. The Sale of Goods Act, 1930, as amended by Act 33 of 1963, and the Specific Relief Act, 1963, have also been inserted respectively as Appendices II and III to the said volume for convenience of reference to the said two Acts.

The author is grateful to Shri S. C. Majumdar, advocate, Supreme Court of India, New Delhi, for his giving to the author consultations while the typescript was in its preparation. Dr. H. N. Sanyal, the late Solicitor-General of India, did much to encourage the author to write this treatise, and he greatly appreciates the kindness and forbearance shown to him by the said late learned Solicitor-General in discussing with him points of law and the advisability of the inclusion or exclusion of much of the material collected for the text.

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Volume II will cover commentaries on Sections 68-238 and include three Appendices giving the text of the proposals made by the Law Commission for the amendment of the Indian Contract Act, 1872 (Thirteenth Report); the text of The Sale of Goods Act, 1930; and the text of the Specific Relief Act, 1963. A full Table of Cases will be given at the end of the second volume.

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LIST OF ABBREVIATIONS USED

A. O. 1937	for Government of India (Adaptation of Indian Laws) Order, 1937
A. O. 1948	..	..	„ Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948
A. O. 1950	..	..	„ Adaptation of Laws Order, 1950
Cf.	..	..	„ Compare
Ins.	..	..	„ Inserted
P.	..	..	„ Page
Pt.	„ Part
Rep.	„ Repealed
S.	„ Section
Ss.	„ Sections
Sch.	„ Schedule
Subs.	„ Substituted

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1. The Specific Relief Act, 1877 (1 of 1877)
2. The Indian Contract Act Amendment Act, 1886 (4 of 1886)
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6. The Repealing and Amending Act, 1917 (24 of 1917)
7. The Indian Sale of Goods Act, 1930 (3 of 1930)
8. The Indian Contract (Amendment) Act, 1930 (4 of 1930)
9. The Indian Partnership Act, 1932 (9 of 1932)
10. The Government of India (Adaptation of Indian Laws) Order, 1937
11. The Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948
12. The Adaptation of Laws Order, 1950
13. The Part B States (Laws) Act, 1951 (3 of 1951)

THE INDIAN CONTRACT ACT, 1872¹

9 OF 1872

[25th April, 1872]

Whereas it is expedient to define and amend certain parts of the
Preamble. law relating to contracts;
It is hereby enacted as follows:

PRELIMINARY

1. Short title.—This Act may be called the Indian Contract Act, 1872.

It extends to the whole of India ²[except the State of Jammu and
Kashmir]; and it shall come into force on the
Extent. Commence- first day of September, 1872.
ment.

1. For the Statement of Objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated 6th July, 1866, see *Gazette of India*, 1867, Extraordinary, p. 34; for the Report of the Select Committee, see *ibid.*, Extraordinary, dated 28th March, 1872; for discussions in Council see *ibid.*, 1867, Supplement, p. 1064; *ibid.*, 1871, p. 313, and *ibid.*, 1872, p. 527. In this almost *verbatim* reprint of the Indian Contract Act, 1872, the marginal notes as appearing in the Ministry of Law, Government of India, version (March, 1963), have been followed, while inside the text they have been printed as they first appeared in the *Gazette of India* in 1872.

The Chapters and Sections of the Transfer of Property Act, 1882 (4 of 1882), which relate to contracts are, in places in which that Act is in force, to be taken as part of this Act—see Act 4 of 1882, s. 4.

This Act has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941) and has been declared to be in force in—

the Sonthal Parganas—see the Sonthal Parganas Settlement Regulation (3 of 1872), s. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, 1899 (3 of 1899), s. 3.

Panth Piploda—see the Panth Piploda Laws Regulation, 1929 (1 of 1929), s. 2.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in—

the Tarai of the Province of Agra—see *Gazette of India*, 1876, Pt. I, p. 505;

the Districts of Hazaribagh, Lohardaga and Manblum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see *Gazette of India*, 1881, Pt. I, p. 504. The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—see *Calcutta Gazette*, 1899, Pt. I, p. 44.

It has been amended in C.P. by C.P. Act I of 1915 and in C. P. and Berar by C.P. and Berar Act 15 of 1938.

2. Subs. by Act 3 of 1951, s. 3 and Sch., for “except Part B States.”

1* * * Nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

2. Interpretation-clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal ;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise ;

(c) The person making the proposal is called the “promisor,” and the person accepting the proposal is called the “promisee” ;

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ;

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement ;

(f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises ;

(g) An agreement not enforceable by law is said to be void ;

(h) An agreement enforceable by law is a contract ;

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract ;

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

1. The words “The enactments mentioned in the Schedule hereto are repealed to the extent specified in the third column thereof ; but” rep. by Act 10 of 1914, s. 3 and Sch. II.

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. Communication, acceptance and revocation of proposals.—The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

4. Communication when complete.—The communication of a proposal is complete, when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustration.

(a) *A* proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) *B* accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete

as against *A*, when the letter is posted;

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

5. Revocation of proposals and acceptances.—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration

A proposes, by a letter sent by post, to sell his house to *B*,

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A*, but not afterwards.

6. Revocation how made.—A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

7. Acceptance must be absolute.—In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

8. Acceptance by performing conditions, or receiving consideration.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. Promises, express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS

10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in ¹[India], and not hereby expressly repealed, by which any contract is required to be made in writing² or in the presence of witnesses, or any law relating to the registration of documents.

11. Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject³, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

12. What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

13. "Consent" defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.

14. "Free consent" defined.—Consent is said to be free when it is not caused by—

1. Subs. by Act 3 of 1951, s. 3 and Sch., for "Part A States and Part C States" which had been subs. by the A.O. 1950 for "the Provinces."

2. See, e.g., S. 25, *infra*; the Copyright Act, 1957, S. 19; the Apprentices Act, 1961; the Carriers Act, 1865, Ss. 6 and 7; the Imperial Bank of India Act, 1920, S. 21; the Companies Act, 1956, Ss. 12, 30, 46 and 109; the Merchant Shipping Act, 1958, Part V; the Trade and Merchandise Marks Act, 1958, Ch. II; and the Marine Insurance Act, 1963, Ss. 24-26.

3. See the Indian Majority Act, 1875.

- (1) coercion, as defined in Section 15, or
- (2) undue influence, as defined in Section 16, or
- (3) fraud, as defined in Section 17, or
- (4) misrepresentation, as defined in Section 18, or
- (5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" defined.—"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

16.¹ "Undue influence" defined.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872.

1. Subs. by Act 6 of 1899, S. 2, for the original S. 16.

Illustrations

(a) *A* having advanced money to his son, *B*, during his minority, upon *B*'s coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services, *B* employs undue influence.

(c) *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

17. "Fraud" defined.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,¹ with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2) The active concealment of a fact by one having knowledge or belief of the fact ;

(3) A promise made without any intention of performing it ;

(4) Any other act fitted to deceive ;

(5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,² or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"If you do not deny it. I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

18. "Misrepresentation" defined.—"Misrepresentation" means and includes—

1. Cf. S. 238, *infra*.

2. See S. 143, *infra*.

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion¹ * *, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) *A*, intending to deceive *B* falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance, *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*. *B* dies. *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

***19A. Power to set aside contract induced by undue influence.**—When consent to an agreement is caused by undue influence, the agreement

1. The words "undue influence" rep. by Act 6 of 1899, S. 3.

2. Ins. by Act 6 of 1899, S. 3.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

(a) *A*'s son has forged *B*'s name to a promissory note. *B*, under threat of prosecuting *A*'s son, obtains a bond from *A* for the amount of the forged note. If *B* sues on this bond, the court may set the bond aside.

(b) *A*, a money-lender, advances Rs. 100 to *B*, an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering *B* to repay the Rs. 100 with such interest as may seem just.

20. Agreement void where both parties are under mistake as to matter of fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A*, being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

21. Effect of mistakes as to law.—A contract is not voidable because it was caused by a mistake as to any law in force in ¹[India]; but a mistake as to a law not in force in ¹[India] has the same effect as a mistake of fact.

2* * * * *

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

3* * * * *

22. Contract caused by mistake of one party as to matter of fact.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

1. The original words "British India" have successively been amended by the A.O. 1948 and the A.O. 1950 to read as above.

2. Para. 2, ins. by the A.O. 1937, omitted by the A. O. 1950.

3. The second *Illustration* to S. 21 rep. by Act 24 of 1917, S. 3 and Sch. II.

23. What considerations and objects are lawful, and what not.—

The consideration or object of an agreement is lawful, unless—

it is forbidden by law¹; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

Illustrations

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months if *C*, who owes that sum to *B* fails to pay it. *B* promises to grant time to *C* accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here, *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment, by *A*, on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence, as such, with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void because it is immoral.

(k) *A* agrees to let her daughter on hire to *B* for concubinage. The agreement is void because it is immoral, though the letting may not be punishable under the Indian Penal Code.

1. See Ss. 26, 27, 28 and 30, *infra*.

Void Agreements

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise, and the consideration for *B*'s promise, being in part unlawful.

25. Agreement without consideration, void, unless.—An agreement made without consideration is void, unless—

It is in writing and registered.—(1) it is expressed in writing and registered under the law for the time being in force for the registration of ¹[documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

Or is a promise to compensate for something done.—(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

Or is a promise to pay a debt barred by limitation law.—(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this Section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) *A* promises, for no consideration, to give to *B* Rs. 1,000. This is a void agreement.

(b) *A*, for natural love and affection, promises to give his son, *B*, Rs. 1,000. *A* puts his promise to *B* into writing and registers it. This is a contract.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.

(d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

26. Agreement in restraint of marriage, void.—Every agreement in restraint of the marriage of any person, other than a minor, is void.

27. Agreement in restraint of trade, void.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold.—*Exception 1.*—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

1* * * * *

28. Agreement in restraint of legal proceedings, void.—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.
Exception 1.—This Section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts.—*When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.*

Saving of contract to refer questions that have already arisen.—*Exception 2.*—Nor shall this Section render illegal any contract in writing, by

1. *Exceptions 2 and 3 rep. by Act 9 of 1932, S. 73 and Sch. II.*

2. This second clause of *Exception 1* to S. 28 was repealed by Act I of 1877, S. 2 and Sch. The clause was, however, in force in certain Scheduled Districts to which the Specific Relief Act, 1877, did not apply. The said Act of 1877 has, however, been repealed and replaced with effect from 1 March, 1964, by the Specific Relief Act, 1963, which extends to the whole of India except the State of Jammu and Kashmir

which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.¹

29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in coconut-oil only, agrees to sell to *B* "one hundred tons of oil". The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager, void.—Agreements by way of wager are void ; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—This Section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294 A of the Indian Penal Code not affected.—Nothing in this Section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294 A of the Indian Penal Code apply.

1. Cf. the Arbitration Act, 1940 (10 of 1940) and the Companies Act, 1956, s. 389.

CHAPTER III

OF CONTINGENT CONTRACTS

31. "Contingent contract" defined.—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay *B* Rs. 10,000 if *B*'s house is burnt. This is a contingent contract.

32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s life-time.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

33. Enforcement of contracts contingent on an event not happening.—Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay *B* a sum of money if *B* marries *C*.

C marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die, and that *C* may afterwards marry *B*.

35. When contracts become void, which are contingent on happening of specified event within fixed time.—Contingent contracts to do

or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced, which are contingent on specified event not happening within fixed time.—Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreements contingent on impossible events, void.—Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A*'s daughter to *C*. *C* was dead at the time of the agreement. The agreement is void.

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be Performed

37. Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

38. Effect of refusal to accept offer of performance.—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :

(1) It must be unconditional ;

(2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;

(3) If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to *B* at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this Section, *A* must bring the cotton to *B*'s warehouse on the appointed day under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

39. Effect of refusal of party to perform promise wholly.—When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the

contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night, *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

By whom Contracts must be Performed

40. Person by whom promise is to be performed.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B*, or by causing it to be paid to *B* by another; and, if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

41. Effect of accepting performance from third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. Evolution of joint liabilities.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. Any one joint promisor may be compelled to perform.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any ¹[one or more] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

1. Subs. by Act 12 of 1891, S. 2 and Sch. II, Pt. I, for "one".

Sharing of loss by default in contribution.—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this Section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) *A, B and C* jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(b) *A, B and C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate and 1,250 rupees from *B*.

(c) *A, B and C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A, B and C* are under a joint promise to pay *D* 3,000 rupees, *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

44. Effect of release of one joint promisor.—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.¹

45. Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.²

Illustration

A, in consideration of 5,000 rupees lent to him by *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life, and, after the death of *C*, with the representatives of *B* and *C* jointly.

Time and Place for Performance

46. Time for performance of promise, where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

1. See S. 138, *infra*.

2. For an exception to S. 45 in case of Government securities, see the Public Debt Act, 1944, S. 8.

Explanation.—The question “what is a reasonable time” is, in each particular case, a question of fact.

47. Time and place for performance of promise, where time is specified and no application to be made.—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at *B*'s warehouse on the first January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

48. Application for performance on certain day to be at proper time and place.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

49. Place for performance of promise, where no application to be made and no place fixed for performance—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. Performance in manner or at time prescribed or sanctioned by promisee.—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Performance of Reciprocal Promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

52. Order of performance of reciprocal promises.—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

53. Liability of party preventing event on which contract is to take effect.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation¹ from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; and if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it,

1. See S. 73, *infra*.

such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) *A* hires *B*'s ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builders' work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month, *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

55. Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.¹

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impos-

1. Cf. Ss. 62 and 63, *infra*.

sible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(c) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

57. Reciprocal promises to do things legal and also other things illegal.—Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house, he shall pay *A* 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments

59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances

1. See S. 65, *infra* and see also the Specific Relief Act, 1963, S. 12.

implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be Performed

62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C*, that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

(b) *A* owes *B* 10,000 rupees. *A* enters into an arrangement with *B*, and gives *B* a mortgage of his (*A*'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) *A* owes *B* 1,000 rupees under a contract. *B* owes *C* 1,000 rupees. *B* orders *A* to credit *C* with 1,000 rupees in his books, but *C* does not assent to the arrangement. *B* still owes *C* 1,000 rupees, and no new contract has been entered into.

63. Promisee may dispense with or remit performance of promise.—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,¹ or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

1. But see S. 135, *infra*.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B*, and *B* accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees, and *B* accepts them, in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.¹

(d) *A* owes *B*, under a contract, a sum of money, the amount of which has not been ascertained. *A*, without ascertaining the amount, gives to *B*, and *B*, in satisfaction thereof accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a [composition] of eight annas in the rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

64. Consequences of rescission of voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.²

65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) *A* pays *B* 1,000 rupees, in consideration of *B*'s promising to marry *C*, *A*'s daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

66. Mode of communicating or revoking rescission of voidable contract.—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.⁴

1. See S. 41, *supra*.

2. Subs. by Act 12 of 1891, S. 2 and Sch. II, Pt. I, for "compensation."

3. See S. 75, *infra*.

4. See Ss. 3 and 5, *supra*.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with *B* to repair *B*'s house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

CHAPTER V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

68. Claim for necessities supplied to person incapable of contracting, or on his account.—If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.¹

Illustrations

(a) *A* supplies *B*, a lunatic, with necessities suitable to his condition in life. *A* is entitled to be reimbursed from *B*'s property.

(b) *A* supplies the wife and children of *B*, a lunatic, with necessities suitable to their condition in life. *A* is entitled to be reimbursed from *B*'s property.

69. Reimbursement of person paying money due by another, in payment of which he is interested.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by *A*, the zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B*'s lease. *B*, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.²

Illustrations

(a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously. ✓

71. Responsibility of finder of goods.—A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.³

1. The property of a Government ward in the G. P. is not liable under this Section, see the G. P. Court of Wards Act, 1899, S. 31 (1).

2. As to suits by minors under S. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act, 1882, S. 32.

3. See Ss. 151 and 152, *infra*.

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2. As to suits by minors under S. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act, 1882, S. 32.

3. See Ss. 151 and 152, *infra*.

72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

(a) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

(b) *A* railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo, which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed

beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(*f*) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

(*g*) *A* contracts to let *B* his ship to for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(*h*) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(*i*) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit, which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(*j*) *A*, having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees being the profit which *A* would have made by the performance of his contract with *B*.

(*k*) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(*l*) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(*m*) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

(*n*) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the

money on that day. *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(*e*) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B*, afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

(*p*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

(*q*) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(*r*) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

74. Compensation for breach of contract where penalty stipulated for.—¹[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.]

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty].

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

1. Subs. by Act 6 of 1899, S. 4, for the first para. of S. 74.

Illustrations

(a) *A* contracts with *B* to pay *B* Rs. 1,000, if he fails to pay *B* Rs. 500 on a given day. *A* fails to pay *B* Rs. 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs. 5,000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

¹[(d) *A* gives *B* a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs. 1,000, by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs. 100 from *B* and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

75. Party rightfully rescinding contract, entitled to compensation.—A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

CHAPTER VII—[*Of Sale of Goods.*] *Rep. by the (Indian) Sale of Goods Act, 1930 (3 of 1930), S. 65.*

1. Added by S. 4, *ibid.*

CHAPTER VIII

OF INDEMNITY AND GUARANTEE

124. "Contract of indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This a contract of indemnity.

125. Rights of indemnity-holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

126. "Contract of guarantee", "surety", "principal debtor" and "creditor".—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

127. Consideration for guarantee.—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) *B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.*

(b) *A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.*

(c) *A* sells and delivers goods to *B*. *C* afterwards, without consideration, agrees to pay for them in default of *B*. The agreement is void.

128. Surety's liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to *B* the payment of a bill of exchange by *C*, the acceptor. The bill is dishonoured by *C*. *A* is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

129. "Continuing guarantee".—A guarantee which extends to a series of transactions is called a "continuing guarantee".

Illustrations

(a) *A*, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £ 100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea to the above value of £ 100, and *C* pays *B* for it. Afterwards, *B* supplies *C* with tea to the value of £ 200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £ 100.

(c) *A* guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

130. Revocation of continuing guarantee.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) *A*, in consideration of *B*'s discounting, at *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.

(b) *A* guarantees to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*. *C* accepts the bill. *A* gives notice of revocation. *C* dishonours the bill at maturity. *A* is liable upon his guarantee.

131. Revocation of continuing guarantee by surety's death.—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person

under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and *B* make a joint and several promissory note to *C*. *A* makes it, in fact, as surety for *B*, and *C* knows this at the time when the note is made. The fact that *A*, to the knowledge of *C*, made the note as surety for *B*, is no answer to a suit by *C* against *A* upon the note.

133. Discharge of surety by variance in terms of contract.—Any variance, made without the surety's consent, in the terms of the contract between the principal¹[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) *A* becomes surety to *C* for *B*'s conduct as a manager in *C*'s bank. Afterwards, *B* and *C* contract, without *A*'s consent, that *B*'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. *B* allows a customer to overdraw, and the bank loses a sum of money. *A* is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) *A* guarantees *C* against the misconduct of *B* in an office to which *B* is appointed by *C*, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the later Act.

(c) *C* agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon *A*'s becoming surety to *C* for *B*'s duly accounting for moneys received by him as such clerk. Afterwards, without *A*'s knowledge or consent, *C* and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. *A* is not liable for subsequent misconduct of *B*.

(d) *A* gives to *C* a continuing guarantee to the extent of 3,000 rupees for any oil supplied by *C* to *B* on credit. Afterwards, *B* becomes embarrassed, and, without the knowledge of *A*, *B* and *C* contract that *C* shall continue to supply *B* with oil for ready money, and that the payments shall be applied to the then existing debts between *B* and *C*. *A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) *C* contracts to lend *B* 5,000 rupees on the 1st March. *A* guarantees repayment. *C* pays the 5,000 rupees to *B* on the 1st January. *A* is discharged from his liability, as the contract has been varied, inasmuch as *C*, might sue *B* for the money before the first of March.

134. Discharge of surety by release or discharge of principal debtor.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B*. *C* supplies goods to *B*, and afterwards *B* becomes embarrassed and contracts with his creditors (including *C*) to assign to them his property in consideration of their releasing him from their demands. Here *B* is released from his debt by the contract with *C*, and *A* is discharged from his suretyship.

1. Ins. by Act 24 of 1917, S. 2 and Sch. I.

(b) *A* contracts with *B* to grow a crop of indigo on *A*'s land and to deliver it to *B* at a fixed rate, and *C* guarantees *A*'s performance of this contract. *B* diverts a stream of water which is necessary for the irrigation of *A*'s land, and thereby prevents him from raising the indigo. *C* is no longer liable on his guarantee.

(c) *A* contracts with *B* for a fixed price to build a house for *B* within a stipulated time, *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. *C* is discharged from his suretyship.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

136. Surety not discharged when agreement made with third person to give time to principal debtor.—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

137. Creditor's forbearance to sue does not discharge surety.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to *C* a debt guaranteed by *A*. The debt becomes payable. *C* does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

138. Release of one co-surety does not discharge others.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.¹

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) *B* contracts to build a ship for *C* for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B*'s due performance of the contract. *C*, without the knowledge of *A* prepays to *B* the last two instalments. *A* is discharged by this prepayment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C*'s favour by *B*, and by *A* as surety for *B*, together with a bill of sale of *B*'s furniture, which gives power to *C* to sell the furniture, and apply the proceeds in discharge of the

1. See S. 44, *supra*.

note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M*'s fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

140. Rights of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. Surety's right to benefit of creditor's securities.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) *C* advances to *B*, his tenant, 2,000 rupees on the guarantee of *A*. *C* has also a further security for the 2,000 rupees by a mortgage of *B*'s furniture. *C* cancels the mortgage. *B* becomes insolvent, and *C* sues *A* on his guarantee. *A* is discharged from liability to the amount of the value of the furniture.

(b) *C*, a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from *A*. *C* afterwards takes *B*'s goods in execution under the decree, and then, without the knowledge of *A*, withdraws the execution. *A* is discharged.

(c) *A*, as surety for *B*, makes a bond jointly with *B* to *C*, to secure a loan from *C* to *B*. Afterwards, *C* obtains from *B* a further security for the same debt. Subsequently, *C* gives up the further security. *A* is not discharged.

142. Guarantee obtained by misrepresentation, invalid.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

143. Guarantee obtained by concealment, invalid.—Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Illustrations

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A* in consequence calls upon him to furnish security for his duly accounting. *C* gives his guarantee for *B*'s duly accounting. *A* does not acquaint *C* with *B*'s previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to *C* payment for iron to be supplied by him to *B* to the amount of 2,000 tons. *B* and *C* have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A*. *A* is not liable as a surety.

144. Guarantee on contract that creditor shall not act on it until co-surety joins.—Where a person gives a guarantee upon a contract that

the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

145. Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) *B* is indebted to *C*, and *A* is surety for the debt. *C* demands payment from *A*, and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs as well as the principal debt.

(b) *C* lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. *C*, the holder of the bill, demands payment of it from *A*, and, on *A*'s refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) *A* guarantees to *C*, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B*. *C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

146. Co-sureties liable to contribute equally.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.¹

Illustrations

(a) *A*, *B* and *C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A*, *B* and *C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A*, *B* and *C* are sureties to *D* for the sum of 1,000 rupees lent to *E* and there is a contract between *A*, *B* and *C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees, and *C* 500 rupees.

147. Liability of co-sureties bound in different sums.—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) *A*, *B* and *C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 30,000 rupees. *A*, *B* and *C* are each liable to pay 10,000 rupees.

1. See S. 43, *supra*.

(b) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 40,000 rupees. *A* is liable to pay 10,000 rupees, and *B* and *C* 15,000 rupees each.

(c) *A, B and C*, as sureties for *D*, enter into three several bonds, each in a different penalty, namely, *A* in the penalty of 10,000 rupees, *B* in that of 20,000 rupees, *C* in that of 40,000 rupees, conditioned for *D*'s duly accounting to *E*. *D* makes default to the extent of 70,000 rupees. *A, B and C* have to pay each the full penalty of his bond.

CHAPTER IX

OF BAILMENT

148. "Bailment", "bailor", and "bailee" defined.—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

149. Delivery to bailee how made—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

150. Bailor's duty to disclose faults in goods bailed.—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) *A* lends a horse, which he knows to be vicious, to *B*. He does not disclose the fact that the horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for damage sustained.

(b) *A* hires a carriage of *B*. The carriage is unsafe, though *B* is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

151. Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.¹

1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words "in the absence of any special contract" in S. 152. See S. 40 (1) of that Act.

2. As to railway contracts see the Indian Railways Act, 1890, S. 73. As to the liability of common carriers, see the Carriers Act 1865, S. 8.

152. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

153. Termination of bailment by bailee's act inconsistent with conditions.—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

154. Liability of bailee making unauthorized use of goods bailed.—If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benaras. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

155. Effect of mixture, with bailor's consent, of his goods with bailee's.—If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. Effect of mixture, without bailor's consent, when the goods can be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. Effect of mixture, without bailor's consent, when the goods cannot be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words "in the absence of any special contract" S. 152. *See* S. 40 (1) of the Act.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Repayment, by bailor, of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

159. Restoration of goods lent gratuitously.—The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

160. Return of goods bailed, on expiration of time or accomplishment of purpose.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. Bailee's responsibility when goods are not duly returned.—If, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.²

162. Termination of gratuitous bailment by death.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. Bailor entitled to increase or profit from goods bailed.—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A*.

164. Bailor's responsibility to bailee.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

165. Bailment by several joint owners.—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the

1. S. 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to goods in their possession, see the Madras Port Trust Act, 1905.

2. As to railway contracts, see the Indian Railways Act, 1890, S. 73.

directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

166. Bailee not responsible on re-delivery on bailor without title.—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.¹

167. Right of third person claiming goods bailed.—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

168. Right of finder of goods. May sue for specific reward offered.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When finder of thing commonly on sale may sell it.—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

170. Bailee's particular lien.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done, *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give a three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.²

1. See the Indian Evidence Act, 1872, S. 117.

2. As to lien of an agent, see S. 221, *infra*. As to lien of a Railway Administration, see the Indian Railways Act, 1890, S. 55.

Bailments of Pledges

172. "Pledge", "Pawnor", and "pawnee" defined.—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

173. Pawnee's right of retainer.—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. Pawnee's right as to extraordinary expenses incurred.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. Pawnee's right where pawnor makes default.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

177. Defaulting pawnor's right to redeem.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them¹; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

[178. Pledge by mercantile agent.—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized

1. For limitation, see the Limitation Act, 1963, Art. 70.

2. Ss. 178 and 178A subs. by Act 4 of 1930, S. 2, for the original S. 178.

by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this Section, the expressions “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Sale of Goods Act, 1930 (3 of 1930).

178A. Pledge by person in possession under voidable contract.—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

179. Pledge where pawnor has only a limited interest.—Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits by Bailees or Bailors against Wrong-doers

180. Suit by bailor or bailee against wrong-doer.—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

181. Apportionment of relief or compensation obtained by such suits.—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X

OF AGENCY

Appointment and Authority of Agents

182. "Agent" and "principal" defined.—An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

183. Who may employ agent.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

184. Who may be an agent.—As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

185. Consideration not necessary.—No consideration is necessary to create an agency.

186. Agent's authority may be expressed or implied.—The authority of an agent may be expressed or implied.¹

187. Definitions of express and implied authority.—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

188. Extent of agent's authority.—An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

Illustrations

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

1. See, however, the Indian Registration Act, 1908, S. 33. See also the Code of Civil Procedure, 1908, Sch. I, Order III, rule 4.

(b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

189. Agent's authority, in an emergency.—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) *A* consigns provisions to *B* at Calcutta, with directions to send them immediately to *C*, at Cuttack. *B* may sell the provisions at Calcutta if they will not bear the journey to Cuttack without spoiling.

Sub-agents

190. When agent cannot delegate.—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

191. "Sub-agent" defined.—A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Representation of principal by sub-agent properly appointed.—Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.—The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility.—The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong.

193. Agent's responsibility for sub-agent appointed without authority.—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

194. Relation between principal and person duly appointed by agent to act in business of agency.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) *A* directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.

(b) *A* authorizes *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* & *Co.* *B* instructs *D*, a solicitor, to take legal proceedings against *C* & *Co.* for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

195. Agent's duty in naming such person.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship-surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Ratification

196. Right of person as to acts done for him without his authority. Effect of ratification.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

197. Ratification may be expressed or implied.—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) *A*, without authority, buys goods for *B*. Afterwards, *B* sells them to *C* on his own account. *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards, *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

198. Knowledge requisite for valid ratification.—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

199. Effect of ratifying unauthorized act forming part of a transaction.—A person ratifying any unauthorized act done on his behalf, ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorized act cannot injure third person.—An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) *A*, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C* who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

Revocation of Authority

201. Termination of agency.—An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

202. Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) *A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) *A* consigns 1,000 bales of cotton to *B*, who has made advances to him on such cotton and desires *B* to sell the cotton, and to repay himself out of the price, the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death.

203. When principal may revoke agent's authority.—The principal may, save as is otherwise provided by the last preceding Section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

204. Revocation where authority has been partly exercised.—The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payment for the cotton.

(b) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A* and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

205. Compensation for revocation by principal, or renunciation by agent.—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206. Notice of revocation or renunciation.—Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and renunciation may be expressed or implied.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards, A lets it himself. This is an implied revocation of B's authority.

208. When termination of agent's authority takes effect as to agent, and as to third persons.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

(a) *A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.*

(b) *A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.*

(c) *A directs B, his agent, to pay certain money to C. A dies and D takes out probate to his will. B, after A's death but before hearing of it, pays the money to C. The payment is good as against D, the executor.*

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

210. Termination of sub-agent's authority.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's Duty to Principal

211. Agent's duty in conducting principal's business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.

Illustrations

(a) *A*, an agent engaged in carrying on for *B* a business in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

212. Skill and diligence required from agent.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London, to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance-broker employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

213. Agent's accounts.—An agent is bound to render proper accounts to his principal on demand.

214. Agent's duty to communicate with principal.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case show, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) *A* directs *B* to sell *A*'s estate. *B* buys the estate for himself in the name of *C*. *A*, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that he has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) *A* directs *B* to sell *A*'s estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A*. *B* informs *A* that he wishes to buy the estate for himself, but conceals the discovery of the mine. *A* allows *B* to buy, in ignorance of existence of the mine. *A* on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—If an agent without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. *A* may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

217. Agent's right of retainer out of sums received on principal's account.—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

218. Agent's duty to pay sums received for principal.—Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

219. When agent's remuneration becomes due.—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

220. Agent not entitled to remuneration for business misconducted.—An agent who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) *A* employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *A*.

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

221. Agent's lien on principal's property.—In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Principal's Duty to Agent

222. Agent to be indemnified against consequences of lawful act.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards, *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

223. Agent to be indemnified against consequences of acts done in good faith.—Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Illustrations

(a) *A*, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C*, and for *B*'s own expenses.

224. Non-liability of employer of agent to do a criminal act.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.¹

1. See S. 24, *supra*.

Illustrations

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C* and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages and also incurs expenses. *A* is not liable to *B* upon the indemnity.

225. Compensation to agent for injury caused by principal's neglect.—The principal must make compensation to his agent in respect of injury¹ caused to such agent by the principal's neglect or want of skill.

Illustration

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

Effect of Agency on Contracts with Third Persons

226. Enforcement and consequences of agent's contracts.—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*.

(b) *A*, being *B*'s agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

227. Principal how far bound, when agent exceeds authority.—When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

228. Principal not bound when excess of agent's authority is not separable.—Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

1. Cf. the Indian Fatal Accidents Act, 1855 (13 of 1855).

229. Consequences of notice given to agent.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases :

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;
- (2) Where the agent does not disclose the name of his principal ;
- (3) Where the principal, though disclosed, cannot be sued.

231. Rights of parties to a contract made by agent not disclosed.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Performance of contract with agent supposed to be principal.—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to *B*, sells 1,000 rupees' worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that

such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A*'s debt.

233. Right of person dealing with agent personally liable.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both for the price of the cotton.

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. Liability of pretended agent.—A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

236. Person falsely contracting as agent, not entitled to performance.—A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

237. Liability of principal inducing belief that agent's unauthorized acts were authorized.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. *C* being ignorant of *B*'s instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A*. The sale is good.

238. Effect, on agreement, of misrepresentation or fraud by agent.—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorized by *B* to make. The contract is voidable, as between *B* and *C*, at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

CHAPTER XI—[Of Partnership.] Rep. by the Indian Partnership Act, 1932 [9 of 1932], S. 73 and Sch. II.

SCHEDULE—[Enactments repealed.] Rep. by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Sch. II.

HISTORICAL BACKGROUND OF THE INDIAN CONTRACT ACT, 1872¹

The Mahomedan Period

During the Mahomedan period both the Hindus and the Mahomedans were governed by the Mahomedan criminal law.² In the realm of the civil law, too, such portion of the civil law of the Mahomedans as related to matters of trade, barter, exchange, sale, contract and the like was made applicable to Muslims and non-Muslims alike. The Hindus had, however, been left undisturbed in the governance of their personal causes by their personal laws.³ The *Futawa Alungiri* provided that the non-Muslim subjects (zimmi) of a Muslim state were not subject to all the laws of Islam.⁴ Their legal relations like marriage, caste, adoption, inheritance, succession, religious usages and institutions were to be regulated according to the precepts of their own faith. Broadly speaking, therefore, it may be said that on the eve of the British rule of India, the Hindu law on the subject of "contract" and the like would be found to have been long abrogated by the Mahomedan law on the subject.

The numerous collections of *futwas* (decisions) of the celebrated Mahomedan lawyers (jurists) forming a mass of precedents hardly surpassed in the legal literature of any nation were constantly referred to as authoritative expositions of the law in all the courts of justice as presided over by the Kazis or the Nawab or the Emperor sitting with the *kazis*, *moofitis*, *ulamas* and other juriconsults.

The British Regime

The Queen Elizabeth's Charter of 31 December, 1600, gave "the Governor and Company of Merchants of London, Trading into the East Indies," popularly known as the London East-India Company, some legislative authority empowering them to make such laws and orders as were necessary for the good government of the Company. For the better advancement of the Company's interests the activities of the personnel employed by the Company had to be regulated. The laws, orders and penalties of the Company had, however, to be reasonable and not repugnant to the laws of England for the time.⁵ The Royal Charters of 31 May, 1609, 3 April, 1661, 27 March, 1669, 9 August, 1683, and 7 October, 1693, recognised the same power of the Company. The Charter of 5 September, 1698, incorporated "The English

1. A substantial portion of this historical introduction was printed in the Journal of the Indian Law Institute. See *ibid.*, vol. 4, No. 3, pp. 373—400.

2. Charles Hamilton : *Hedaya*, London, 1791, Preliminary Discourse, Ixxxvi.

3. *Ibid.*, Preliminary Discourse.

4. See *Futawa Alungiri*, Book XIII, *Siyur* (Arabic version).

5. The Charter of 31 December, 1600.

Company, Trading to the East Indies," popularly known as the English East-India Company. "The United Company of Merchants of England, Trading to the East Indies" emerged as a new Company from the amalgamation of the two former Companies on 29 September, 1708. This United Company later became known as the East-India Company.¹

In exercise of its power, the London East India-Company had taken up as early as 1668 the judicial administration of the islands of Bombay whose *sovereignty* also had vested in the British King by its transfer in 1661 by the King of Portugal.² The laws established there by the Company were fairly exhaustive and administered by a hierarchy of courts with distinct jurisdictions, though not always with a duly qualified judicial personnel.

In Madras, again, the Mayor's Court consisting of the Mayor and Aldermen and other officers had been functioning satisfactorily for a long time when the settlement at Fort William in Bengal could be declared a Presidency in December, 1699.

The acquisition of the three villages of Sutanati, Govindpur and Calcutta in 1698 placed the Company in the position of a zamindar paying revenue to the Emperor at Delhi and exercising the limited criminal and civil jurisdiction of a collector of revenue over the native population there. Secondly, as noted before, the Company was a corporate body exercising some amount of sovereign authority derived from the King of England, through the medium of Charters, over His Majesty's subjects residing at the various settlements in India.

The power at Delhi having waned, the English became, after the bestowal of the Dewani on them, in August, 1765, the dominating power³ in Bengal, Bihar and Orissa.⁴ Hastings, in accordance with the instructions of the Court of Directors, repudiated, in 1774, the obligation of making to the Emperor at Delhi the annual payment of 26 lakhs of rupees, which, according to Lord Clive's agreement with Shah Alam, was due to the Emperor as his share of revenue.⁵ The Supreme Court at Calcutta, too, after due deliberation on the specific question raised by Councillors John Clavering, George Monson, and Phillips Francis in their letter dated, Revenue Department, Fort William, 20 June, 1775, unequivocally decided in two cases⁶ in 1775 that the Nawab

1. 3 and 4 William, 4 cap. 85, sec. cxi.

2. The Charter of 27 March, 1669.

3. General Letter from Bengal to the Court of Directors, 30 September, 1765; Minute of Clavering, Monson and Francis: Consultations, 18 October, 1775; Minute of Warren Hastings; Consultations, 7 December, 1775.

4. "Orissa" at the point of time factually meant primarily the modern district of Midnapur in West Bengal. It was only after about forty years that the Province of Orissa could be acquired by the British.

5. General Letter to Bengal from the Court of Directors, 11 November, 1768.

6. The case of Joseph Fowke, Francis Fowke, Maharaja Nuncomar and Roy Radha Churn for a conspiracy against Warren Hastings, Esq., and the case of Joseph Fowke, Maharaja Nuncomar and Roy Radha Churn for a conspiracy against Richard Barwell.

of Moorshedabad could not be considered as the sovereign authority in Bengal, Bihar and Orissa.

Meanwhile, a number of Charters were granted and Acts passed. The Charter granted by Charles II to the Company in 1683 enjoined the Court to decide according to equity and good conscience, and according to the laws and customs of merchants. The said provisions were continued in the Charter granted by James II in 1686. A similar power was given to the new East-India Company by the Charter of the 10th William III granted in September, 1698.

By the Royal Charter granted in 1726, the 13th year of the reign of King George I, all the common and statute law at that time extant in England was introduced into the Indian Presidencies.¹ Whatever the real significance of the said Charter of 1726, the courts in the Presidencies of Calcutta, Bombay and Madras, if not the Privy Council in England, worked on the basis of the applicability of the English common and statute law as extant in England in 1726 to the said three Presidencies.

The Regulating Act, the 13th Geo. III. c. 63, passed in 1773,² empowered the Governor-General and Council to make and issue such Rules, Ordinances, and Regulations, for the good order and civil government of the United Company's settlement at Fort William in Bengal, and all places subordinate thereto, as should be deemed just and reasonable, and not repugnant to the laws of the realm; such regulations should not be valid unless registered in the Supreme Court of Judicature to be established under the said statute. In 1797 the 37 Geo. III, c. 142 confirmed the power of making local laws already vested in the Governor-General in Council. In 1807, the 47 Geo. III, Sess. 2, c. 68, too, conferred more formally the same power on the Bombay and Madras Governments.

The 3rd and 4th William IV, c. 85, by Section 43, empowered, in 1833, the Governor-General in Council for India to legislate for India, by repealing, amending or altering, former or future laws and regulations and by making laws and regulations for all persons whether British or native, foreign or others, and for all Courts of Justice, whether as established by His Majesty's Charters or otherwise. Such laws and regulations should have the force of Acts of Parliament and their registration and publication in any court of justice would be unnecessary. The right of the British Parliament to legislate for India was however not affected.

The introduction of the British laws and procedures in the courts established by Royal Charters in the Presidency Towns worked hardship and confusion to the native population working or carrying on business or settled in the said three towns. This was specially true of the Presidency Town at Fort William in Bengal in the post-Plassey days where the native population concerned was very much sensitive and alert, and Warren Hastings and Sir

1. *Clarke's Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal, 1829.*

2. *Ibid.*, Sections 36 and 37.

Elijah Impey vindictive and rigorous. At the point of time, the native population of Bombay and Fort Saint George had been accustomed to the English law and procedure as had been introduced there with the necessary modifications.

The Declaratory Act of the 21st Geo. III, c. 70, which was passed in 1781 for explaining and defining the powers and jurisdiction of the Supreme Court at Fort William in Bengal, expressly enacted, by Section 17, that, in disputes between the native inhabitants of Calcutta, "their inheritance and succession to lands, rents, and goods, and all *matters of contract* and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus (Hindus) by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant." Section 18, too, of this Act preserved to the natives their laws and customs. This reservation of the native laws to Hindus and Mahomedans was extended to Madras and Bombay by Sections 12 and 13 of the 37th Geo. III, c. 142, passed in 1797. Under this statute the Recorder's Courts at Madras and Bombay were established superseding the Mayor's Courts there. Sections 12 and 13 of this statute respectively re-enacted the 18th and 17th Sections of the 21st Geo. III, c. 70.

By 39th and 40th Geo. III, c. 79, s. 5, in 1799-1800, and 4th Geo. IV, c. 71, s. 9, in 1823, all powers and authorities granted to the said Recorder's Courts at Madras and Bombay were transferred to the Supreme Courts at those Presidencies to be established respectively under the said statutes. Section 22 of the Charter of Justice of the Supreme Court at Madras, and Section 29 of the Charter of Justice of the Supreme Court at Bombay contained the provisions of the 13th Section of the 37th Geo. III, c. 142.

In the *mofussil*, the old system of Courts, procedures and laws was retained to a very great extent and for a considerable period of the Company's regime. Rule 23 of the Hastings's Plan of 1772 (for Bengal, Bihar and Orissa) reserved to the natives their laws; and so did the first Regulation as was passed on 17th April, 1780. By Section 27 of this Regulation it was enacted, "That in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the *shaster* with respect to Gentoos, shall be invariably adhered to." In 1781 this Section was re-enacted in the Revised Code with the addition of the word "succession."¹

Section 15 of Regulation IV of the Bengal Code, 1793, enacted that in suits regarding succession, inheritance, marriage and caste and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus were to be considered as the general rules by which Judges were to form their decisions. Section 3 of Regulation VIII of 1795 also enacted, in addition to the provisions of Sec-

1. Beng. Jud. Reg. VI of 1781, S. 37.

tion 15 of Regulation IV of 1793, that in causes in which the plaintiff should be of a different religious persuasion from the defendant, the decision was to be regulated by the law of the religion of the latter, excepting where Europeans, or other persons, not being either Mahomedans or Hindus, should be defendant, in which cases the *law of the plaintiff* was to be made the rule of decision in all plaints and actions of a civil nature. The same provisions were extended to Benares and Upper Provinces.¹

Section 8 of the Bengal Regulation VII of 1832 rescinded the portion of Section 3 of Regulation VIII of 1795, above quoted, and enacted that the rules contained in Section 15 of Regulation IV of 1793 and Section 16 of Regulation III of 1803 should be the rule of guidance in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions that might arise between persons professing the Hindu and Mahomedan persuasions respectively. Section 9 of this Regulation VII of 1832 laid down: "Whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such case of any rules not sanctioned by those principles."

The above innovation was for the time being confined to the Bengal Presidency. Earlier, when courts of judicature were first established by the East-India Company in the Madras Presidency, in the year 1802, Regulation III of the new code was formed on the Bengal Regulation IV of 1793, nearly the same words being used with regard to the preservation of the Hindu and Mahomedan laws as those employed in the latter regulation. In the Bombay Presidency also, in the year 1799, the Governor and Council passed a Regulation, namely, Regulation IV of 1799, to the like effect but more explicit and extensive in its application. This Bombay Regulation IV of 1799, by Section 14, secured to Hindu and Mahomedan defendants, the benefit of their own laws in civil suits respecting "the succession to, and inheritance of, landed and other property, *mortgages, loans, bonds, securities, hire, wages, marriage*, and caste, and every other claim to personal or real right and property, so far as shall depend upon the point of law". It also provided that in the case of Portuguese² and Parsi³ inhabitants, the judge was to be guided by a view to equity in his decisions, making due allowance for their respective customs, so far as he could ascertain the same.

1. Sec. 3 of Reg. VIII of 1795; Sec. 16 of Reg. III of 1803.

2. See also *post*.

3. *Deen Shah v. Pestunjee* (1822) 2 Borr. 375. See also *post*.

Regulation II of 1800 re-enacted the same provisions. In 1827, when all the Judicial Regulations, previously passed by the Bombay Government were rescinded, it was enacted that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone."¹

The Parsis were governed by the law of their customs.² Their marriage contracts were governed by their customs.³ The Regulations were also applicable to them.⁴ Apart from customs and regulations, the Parsis were held entitled even in the Sudder Court at Bombay to the benefits of the English law.⁵ The Parsis did not want the English law, in its entirety,⁶ but they wanted to be governed by the principles of English law subject to their customs and with the necessary exceptions in regard to the law of succession on a man's dying intestate.⁷

The Arminian law, where ascertainable, was applied to the Armenians.⁸ Otherwise, they were governed at Fort William by principles of British law.⁹ It will be recalled that the Armenians in India desired as early as 22 June, 1688, to be governed by the Law of England.¹⁰ The Jews at Calcutta were governed by English law.¹¹ The Portuguese settled in the British territories were held British subjects governed by English law.¹²

Subject to above, it may be observed that the class of natives of India who were neither Hindus nor Mahomedans relied in most instances almost entirely upon custom.

The Laws in Operation

The Courts functioning at the three Presidency Towns had had laws and procedures different to a great extent from the courts of law functioning in the rest of the British empire in India.

1. Bombay Regulation IV of 1827, Section 26.
2. *Deen Shah v. Pestunjee* (1812) 2 Borr. 375.
3. *Nowrojee Khooshedjee v. Dhuna Baee* (1811) 1 Borr. 382.
4. *Furidoonjee v. Jumshedjee* (1811) 1 Borr. 23.
5. Section 42 of Reg. III of 1800; *Lulloo Bhaxe Girdhurdass v. Sorabjee* (1814) 1 Borr. 121; *Buchooboye v. Merwanjee Nasserwanjee* (1844), Perry's Notes, Case 15.
6. Special Reports of the Indian Law Commissioners, 1842, 465.
7. Special Reports of the Indian Law Commissioners, 1847, 619, 621: Minute by G. Giberne, dated, 27 January, 1843, and Minute by Anderson, dated the 23rd.
8. *Avietick Ter Stafanoos v. Khaja Michael Aratoon* (1820) 3 S.D.A. Rep. 9.
9. *Doe dem. Aratoon Gasper v. Puddolochun Doss* (1815), East's Notes, Case 36. *Emin v. Emin*, cited in *Stephen v. Hume*, 1 Fulton 227.
10. Special Reports of the Indian Law Commissioners, 1842, 465.
11. *Musleah v. Musleah* (1844) 1 Fulton 420.
12. *Joanna Fernandez v. De Silva* (1847) 2 S.D.A. Rep. 227; Special Reports of the Indian Law Commissioners, 1842, 465.

The law obtaining in the Mayor's Courts at Calcutta,¹ Madras and Bombay, the Recorder's Courts at Madras and Bombay and the Supreme Courts at Calcutta, Bombay and Madras consisted of the following :

(1) The common law as it prevailed in England in 1726 and which had not subsequently been altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

(2) The statute law which prevailed in England in 1726 and which had not subsequently been altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

(3) The statute law expressly extending to India, which had been enacted since 1726, and had not been repealed and the statutes which had been extended to India by the Acts of the Legislative Council of India.

(4) Civil law as it obtained in the Ecclesiastical and Admiralty Courts in England.

(5) Regulations made by the Governor-General in Council and the Governors in Council previously to the 3rd and 4th William IV. c. 85, and registered in the Supreme Courts, the Acts of the Legislative Council of India made under the 3rd and 4th William IV. c. 85, and the Acts of the Local Governments of Bombay and Madras after the restoration of legislative power in their favour in 1861, and of the Local Government of Bengal after the Legislative Council had been constituted there by a Proclamation made on 17 January, 1862.²

(6) The Hindu law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu was a defendant.

(7) The Mahomedan law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Mahomedan was a defendant.

The laws administered in the Sudder and mofussil courts were the following :

(1) The Regulations enacted by the Governments at the three Presidencies previously to the 3rd and 4th Will. IV. c. 85 and the Acts of the Legislative Council of India passed subsequent to that statute, and later also the Acts of the Governments at the three Presidencies. Under the Charter Act of 1833, the Governor-General became the sole authority for promulgating laws for all persons and courts of justice. Under the Charter Act of 1853, a sort of Legislative Council was established composed of members of the Supreme Council, one representative each from the Local Governments and two Judges of the Supreme Court at Calcutta. This Legislature enacted, for a time, all laws whether of Provincial or all-India application. The Local Governments either themselves sent legislative proposals to the Centre or, after 1854, got them introduced there through their representatives sitting there.

1. *See also post.*

2. The Indian Councils Act, 1861.

This state of things continued till 1861 when legislative power was restored to the Governments of Bombay and Madras. The Bengal Legislative Council was also constituted, as noted before, on 17 January, 1862.

(2) The Hindu civil law in all suits between Hindu parties regarding succession, inheritance, marriage, and caste, and all religious usages and institutions.

(3) The Mahomedan civil law in similar suits between Mahomedan parties.

(4) The laws and customs, so far as the same could be ascertained, of other natives of India not being Hindus or Mahomedans, in similar suits where such other natives were parties.

(5) The Mahomedan criminal law as modified by the Regulations. In Bombay the penal law of the Mahomedans was superseded almost completely by the Regulations. The penal law governing the people of the Presidency of Bombay could almost all be found in the extensive Bombay Regulation XIV of 1827. In Bengal it was from the year 1832 that the people of Bengal, Bihar and Orissa not professing Mahomedan faith were absolved, if they so desired, from the operation of the Mahomedan criminal law.¹ In Madras, too, by the thirties of the nineteenth century, Mahomedan penal law was functioning only in name, it being modified and replaced by Regulations.² By the time of the emergence of the Draft Indian Penal Code in 1837 the penal law of Bengal, Bombay and Madras widely differed from the criminal law of the Mahomedans.

The Revival of Hindu Law

From the provisions of the Charters, Statutes and Regulations referred to above it will appear that the law of contract of the Hindus, among their other laws, was, under the Company's regime, revived to a limited extent for its day-to-day application in the courts of law. This was specially true of the law as administered in the courts known as the Sudder and Mofussil Courts. It has to be noted, however, that the saving of the Hindu or Mahomedan laws could not be left unaffected under the Company's Administration. The personal laws of the Hindus and Mahomedans had to be modified by the Regulations and Acts as passed by the legislative authorities from time to time.

The revival of the Hindu law and the continuance of the Mahomedan law were responsible for the emergence of a few new texts on the subjects of Hindu and Mahomedan law during the Company's regime. A mention may be made herein of a few such texts as especially pertained to the Hindu law of contract.³

1. Article 5 of Reg. VI of 1832.

2. The Indian Law Commission in their prefatory letter dated the 14th of October, 1837, while submitting the printed Draft Indian Penal Code to the Right Hon'ble Lord Auckland, Governor-General of India in Council.

3. For the work done during the Company's period in the matter of rendering the Hindu and Mahomedan laws in English, Persian, Bengali and Hindi, see *Morley's Analytical Digest*, vol. I, 1850, Introduction.

in victory for the English on 23 June, 1757, the courts of law at Fort William did not execute any of their orders or decrees which might embitter the relations between the Company and the Nawab at Moorshedabad. In fact, the Court of Sessions at Fort William, which was a King's Court, was, by an *Injunction* from the Mogul in whose dominion the Town of Calcutta stood, prohibited to put to death, by the English laws, any of the natural born subjects of the Mogul. The Court, too, thought that it could not bring such subjects within the cognizance of the English Court without 'risque' of embroiling the Hon'ble the East-India Company's affairs in those kingdoms.¹ The position, however, changed after the elevation of the Company in the post-Plassey days.

In the Supreme Courts

English common law principles were followed in cases of contract in the Supreme Courts at Calcutta, Bombay and Madras.² The Regulations as made by the Governors in Council or Governor-General in Council were also followed.³ The common law distinction between parol contracts and contracts under seal was also maintained.⁴ In the matter of the formulation of the principle of public policy⁵ or in cases of statutory illegality⁶ vitiating a contract, the judges followed the principles as accepted in England. In their equity side, the Supreme Courts exercised the principles of equity as a matter of regular jurisdiction.⁷

The question of jurisdiction of the Supreme Court at Calcutta over persons professing Hindu or Mahomedan religion had been a vexed question throughout the period of its existence. For an accurate study of the subject, reference may be made to the *placita* under head "Jurisdiction" in Volume I of William H. Morley's *Analytical Digest*, 1850.

Whether a person was a Hindu or a Mahomedan did not form the sole point of contention in the question of jurisdiction. The *lex loci contractus*⁸ as

1. Records, Calcutta High Court; Proceedings (Manuscript), Town of Calcutta Sessions, 20 August, 1755.

2. *Binny v. Watson* (1800) 1 Str. 69 (bailment). *Shuick Devaljee v. Mauway Chitty* (1809) 2 Str. 23. *Mohan Loll Tagore v. Noroojee Cahoonjee* (1815) East's Notes, Case 16. *Cursondass Hunsraz v. Ramdass Huridass* (1842) Perry's Notes, Case 4. *Wood v. Goluckchunder*, 1st Term (1843) 1 Fulton 139 (bailment). *Coassimbhoy Nathbhoy v. Jewaraz Balloo* (1846) Perry's Notes, Case 17.

3. *Wujoo Bhace v. Jace Bhace* (1819) 1 Borr. 310 (interest).

4. *In the goods of Peacock* (1781), Hyde's Notes, 1781; Mor. 6 (debts). *In the goods of Kellican*, 1st Term. 1786, Mor. 10.

5. *Park v. Mootiah* (1799) 1 Str. 3.

6. *Horsely v. Perreau*, Chamb. Notes (1791) Mor. 362.

7. *Dutturam Turrufdar v. The United Company and Watson*, Hyde's Notes (1779); Mor. 254. *Vencata Runga v. The East-India Company* (1803) 1 Str. 174 (unclean hands). *Gooroopersaud v. Habberly* (1815), East's Notes, Case 32. *Sukies v. Sukies* (1816) 2 East's Notes, Case 42.

8. *Greedhur Baboo v. Sree Luchenundun Doss*, Hyde's Notes; 1781 Sm. R. 52; Mor. 350.

well as the terms of the contracts¹ were also considered relevant.

It was held that any person born in Calcutta before the year 1757 could not be included within the meaning of the term, "His Majesty's subject" in the 13th Geo. III. c. 63. S. 16.²

Persons born in Bombay were considered as British subjects.³

In *Manickram Chattopadha v. Meer Conjeer Ali Khan* (1782), it was decided that an inhabitant of Calcutta was not as such a British subject within the meaning either of the 13th Geo. III. c. 63 or the 21st Geo. III. c. 70. The principles of Hindu law even in the realm of contracts were therefore recognized.⁴ It was often however the practice of the Supreme Court at Calcutta to administer English law between Hindu or Mahomedan parties as between British subjects, except only in cases falling within the specific exception in Section 18 of Statute 21 Geo. III. c. 70.⁵

There were Court Pundits in the Supreme Court at Calcutta to express their views on questions of Hindu law.⁶ The court sometimes compelled the parties to submit the matter to pundits of their own selection, and would decree on such opinion. Opinions of pundits were also read⁷ or referred to⁸ by the parties. Pundits were also personally interrogated by the Court and all sorts of Sanskrit texts were referred to and consulted.⁹ The same was true also of the Mahomedan law. Mahomedan law officers, like Hindu pundits, were attached in the Supreme, Sudder and mofassul courts.

The English laws prohibiting usury applied in India only to British subjects¹⁰ and not to native lenders.¹¹ Inhabitants of Calcutta as such were not subject to the law of usury under Statute 13 Geo. III. c. 63.¹² Interest agreed upon was accordingly allowed though more than 12 per cent. where statute 13 Geo. III. c. 63 did not apply.¹³ A usurious contract between native parties was, however, held to be within the English statute 13 Geo. III. c. 63 if the contract had been made in Calcutta.¹⁴ All this was, however subject to equity. The Supreme Courts, therefore, sometimes disallowed interest at 12 per cent. and sometimes even denied it altogether, though expressly reserved

1. *Christie v. Hadji Sirdar*, Hyde's Notes, 1783; Mor. 130.

2. *De Rozio v. Chatgeer Gosain*, Chamb. Notes, 1789; Sm. R. 104; Mor. 136.

3. *Manickchund Tagore v. W. Johnson. Narain Sing v. W. Johnston* (1785), Hyde's Notes, Sm. R. 100 Mor. 131.

4. *Nocoor Bysack v. Gopalchand Seat*, Chamb. Notes (1788), Mor. 82. *Raja Burrodicaunt Roy v. Bisnoondery Dabee* (1836) Mor. 91 (Pledge).

5. *Soodasun Sain v. Lockenauth* (1839), Mor. 107.

6. *Modun Mohun Corformah v. Nando Comar Corformah* (1780).

7. *Russik Lall Dutt v. Chilon Churn Dutt* (1789).

8. *Sree Ooday Cowar v. Mohun Lal Bussey* (1790-91).

9. *Radhamoney Dassi v. Sri Muti Durga Dassi* (1794).

10. *Hulodhur Ghose v. Connyloll Tagore* (1844) 1 Fulton 411.

11. *Issenchunder Chatterjee v. F. W. Biddle* (1851); *Essen Chunder v. F. T. Biddle* (1851).

12. *Manickram Chattopadha v. Meer Conjeer Ali Khan*, Hyde's Notes (1782) Sm. R. 53; Mor. 125.

13. *Weston v. Chandraney* (1778) Hyde's Notes (1778) Sm. R. 51, Mor. 231.

14. *Greedhur Baboo v. Sree Luchenundun Dass*, Hyde's Notes 1781 Sm. R. 52; Mor. 350.

by the contract, where the transaction was usurious and oppressive.¹ Interest was, again, sometimes allowed on the basis of usages of trade.² All this was responsible for the position that where statute 13 Geo. III. c. 63 did not apply to native parties, a security or contract, though usurious in its nature, could not be held void, and yet the court could or would allow only such interest as a British subject could legally take.³ The Supreme Courts could, on this principle of equity, apply the principle of illegal interest even where the parties were not His Majesty's subjects.⁴

The Hindu law as enunciated in the *shastras* was applied in cases of mortgages by the Hindus.⁵ The sanctity of usage and immemorial custom was recognized in the Supreme Courts. It was on the recognition of the force of usage obtaining in Bengal that it was held in *Sibnarain Ghose v. Russick Chunder Neoghy* (1842)⁶ that a Bengalee mortgage, even though unaccompanied with possession, gave a lien upon the land. Regulation I of 1798 was also found to have fortified the decision as arrived at by the Supreme Court.

Trade usage of the Hindu community had the force of law.⁷ The local customs of merchants were thus applied as the basis of decisions.⁸

Land was made subject to debts in the hands of British, Hindu or Mahomedan subjects; in the hands of the two latter by their general codes; in the hands of the British subjects, by the terms or construction of the Charter, and of the Acts auxiliary to it.⁹

The law governing the rights and disabilities of minors whether under the Hindu or Mahomedan law was given its due consideration in the Sudder and Supreme Courts. For the peculiarities of the Mahomedan law regarding infancy or limitation a reading of the *placita* under the respective heads of "Infant" and "Limitation" in William H. Morley's *Analytical Digest*, 1850, Vol. I, will be very useful.

According to the several Hindu texts, the sixteenth year limited the term of Hindu minority. Opinions, however, varied as to whether the limit was the first or the last day of the sixteenth year. According to Bengal authorities, the adult age began with the first day of the sixteenth year.¹⁰ In *Lachman*

1. *Gooroofersaud Bose v. Habberly* (1815) East's Notes, Case 32.

2. *Bissumber Mullick v. Stubb* (1821) East's Notes, Case 28. *Dada Bhaee Ruttunjee v. Joseph Nimo* (1822) 2 Borr. 339.

3. *Ramsunker Halder v. Anundo Moy*, Chamb. Notes 1788, Sm. R. 134; *Prawnkissen Dur v. Oditchurn Roy* (1815) Sm. R. 54.

4. *Sreemutty Janokey Dossee v. Durgaram Dossee*, Hyde's Notes (1779) Sm. R. 51; Mor. 349. *Kistochn Shaw v. Rutton Coondoo*, Hyde's Notes (1780) Sm. R. 51; Mor. 350. *Petruse David v. Suckrajat Phahurry* (1782) Sm. R. 52. *Forbes v. Day* Chamb. Notes, 1786; Sm. R. 134 Mor. 351.

5. *Mt. Goolab v. Mt. Ichha* (1820) 1 Borr. 313; *Raja Burrodicaunt Roy v. Bisnosoondery Dabee* (1836) Mor. 91; *Parvutee v. Sooruj* (1823) 2 Borr. 516.

6. *Cited, Sibchunder Ghose v. Russick Chunder Neoghy* (1842) 1 Fulton 36.

7. *Mohon Ioll Tagore v. Noroojee Cahoojee* (1815) East's Notes, Case 16.

8. *Morell v. Cockerell* (1825) 1 Fulton, 209.

9. *Joseph v. Ronald* 1 Moor. Ind. App. 327.

10. Morley: *Analytical Digest*, vol. I, 1850, 302.

Das v. Rup Chand (1831)¹ it was held that according to the Hindu law, majority began with the seventeenth year. Under Regulation XXVI of 1793, Section 2, minority, in the case of Hindus and Mahomedans, extended to the expiration of their eighteenth year. An infant could not execute a lease nor enter into any other agreement.² It will be interesting to recall that it was held in *Ranee Hurrosoondery v. Cowar Kistonauth Roy* (1841)³ that a Hindu father might, by will, postpone his son's majority beyond the age of sixteen years.

The English Statute of Limitations (21 Geo. III. c. 70, S. 17) did not apply to Hindu parties in the Supreme Court at Calcutta.⁴ The limitation by Hindu law had, however, to be specially pleaded between Hindu parties before the court.⁵ Where the court could not presume from the names of parties that they were Hindus, the general law, that is, the law of England, was held applicable.⁶ Where Hindu law of limitation was clearly applicable, its principles were applied even when inconsistent with the English rules thereon.⁷

The claims of the personal laws of the Hindus and Mahomedans as well as of the English common law principles of contract were, as we have seen, subject to the rules⁸ and notions⁹ of equity. The Supreme Courts exercised their equity jurisdictions¹⁰ in cases of contract in order to mitigate¹¹ the rigours of the personal laws of the Hindus and Mahomedans or of the English common law as would otherwise be applicable in a case between party and party.¹² This might result in some cases in a deviation even from the recognized principles of the English common law of contract¹³ or in a conflict of decisions on the same fact-situation.¹⁴

In the Sudder Courts

Mahomedan Law

The peculiarities of the Mahomedan law, including the law of contract,

1. 5 S.D.A. Rep. 114 (Sudder Court, Calcutta).
2. *Kallupnath Sing v. Kumlapat Jah* (1829) 4 S.D.A. Rep. 339 (Sudder Court, Calcutta).
3. 1 Fulton. 393.
4. *Kistnochund Seal v. Ramdhone Nundun* (1834) Mor. 345; *Meenasahyer Brahminee v. Arnachella Chittee*, (1840) Mor. 345. *Kristnochunder Sincar v. Ramdhone Nundy* Mor. 345.
5. *Mohun Persad Takoor v. Loll Beharry Chaml.* Notes (1790) Sm. R. 92. Mor. 392.
6. *Mahadan Dutt v. Muttee Chund* (1824) Mor. 344.
7. *Parrutee v. Soornj* (1823) 2 Borr. 516.
8. *Sir William Burroughs v. Gopernath Bose* (1821), East's Notes, Case 24.
9. *Latchemy Umna v. Lewcock* (1800) 1 Str. 30 (agent and principal).
10. *Kissoree Dassee v. Mullick* (1815) East's Notes, Case 12; *Lukmeedas Vereedas v. Mt. Mankoonwur* (1821) 2 Borr. 114.
11. *Doe dem. Gunganarain Bonnerjee v. Bulram Bonnerjee*, East's Notes, Case 85.
12. *Jyasamy v. Colingaray Moodeliar* (1809) 2 Str. 47. *Shaick Devaljee v. Mfauray Chitty* (1809) 2 Str. 23. *Gooroopersaud Bose v. Habberly* (1815) East's Notes, Case 32.
13. *Bungsheeder Shaw v. Tickman Buckett* (1820) East's Notes, Case 121 (obligation of principals to third parties).
14. *Bungsheeder Shaw v. Tickman Buckett* (1820) East's Notes, Case 121 (agent and principal) and *contra*, *Bank of Bengal v. The East-India Company* (1834), 2 Knapp. 245 (agent and principal).

were obeyed.¹ A composition for murder, for example, was allowed by the Mahomedan law, and the agreement for it became a binding contract. For the acceptance of the said proposition in the Sudder Dewanny Adawlut at Calcutta, 4 *Hidaya*, 99, was relied on.² The Governor-General and Council constituted, at the time, the said Sudder Court, and the Court was presided on the day (10 April, 1794), by Sir John Shore.³

The different schools of Mahomedan law on the subject of debts received occasional discussion.⁴ Contracts of sale,⁵ release,⁶ assignment,⁷ pledge⁸ or the like⁹ were decided on the basis of the principles of the Mahomedan law. Marriage contracts of the Mahomedans were governed by the principles of their personal law.¹⁰ Their personal law of limitation was also applicable.¹¹ The Mahomedan principles of equity, as distinguished from the English, were given their due consideration.¹² A deed of contract containing a provision contrary to an express ordinance of the Mahomedan law was held void and ineffectual.¹³

Hindu Law

In the absence of the Hindu or Mahomedan law or a Regulation or Act governing a particular contract, the English common law principles were followed also in the Sudder Courts.¹⁴ Where Regulations,¹⁵ Acts or general usage¹⁶ governed the matter, they were so applied. In those days, as now,

1. *Agha Mohammad Mahadustee v. Sait Gopal Doss Mookoondoss* (1805) 1 Mad. Dec. 1 (Sudder Court, Madras); *Kurrinoollah Khan v. Hutton* (1819), East's Notes, Case 101 (bill of exchange); *Nabob Roostoomjah Bahaudur v. Aga Mahummud Ebrahim* (1818) 1 Mad. Dec. 207; *Kishwur Khan v. Jeurun Khan* (1799) 1 S.D.A. Rep. 25; *Mt. Rabea Khatoon v. Budroonissa* (1841) 7 S.D.A. Rep. 62.

2. *Hedaya* was in great use in the administration of justice in Bengal at the time. See *Memoire of Sir William Jones*, London, 1807, vol. 2, 25.

3. *Nunda Sing v. Meer Jafiei Shah* (1794) 1 S.D.A. Rep. 4.

4. *Mt. Pootee Begum, Applicant* (1840) 1 Sev. Cases, 57.

5. *Doe d.m. Ramtonoo Mookerjee v. Bibee Junut* (1843) 1 Fulton, 152.

6. *Mt. Khanum Jan v. Mt. Jan Beebee* (1827) 4 S.D.A. Rep. 210.

7. *Aiman Bibi v. Ibrahim Khan* (1833) 5 S.D.A. Rep. 304.

8. *Muhammud Muthir Khan v. Sayud Abdul Hakim* (1832) 5 S.D.A. Rep. 226.

9. *Beebee Jugun v. Bakir Ali* (1804) 1 S.D.A. Rep. 78; *Moohummud Umeer Khan v. Jumadar Bucha Bhaee* (1822) 2 Borr. 179.

10. *Jumal Bhaee Kumal Bhaee Sonee v. Sahib Buhoo* (1820) 2 Borr. 556; *Kureem Jeewun v. Mt. Muriyum* (1821) Sel. Rep. 56; *Mt. Fukhronissa v. Shah Ally Ruzzah* (1840) 6 S.D.A. Rep. 293.

11. *Mt. Khanum Jan v. Mt. Jan Beebee* (1827) 4 S.D.A. Rep. 210.

12. *Moulouee Syud Ashruf Ali v. Mirza Qasim* (1820) 3 S.D.A. Rep. 49; *Mirza Beebee v. Toola Beebee* (1829) 4 S.D.A. Rep. 334. *Mt. Hingoo v. Meer Furzund Ali* (1828) 4 S.D.A. Rep. 307; *Hidalet Ali Khan v. Hissam Ali Khan* (1839) 6 S.D.A. Rep. 257.

13. *Muhammud Yakub v. Wajid-un-Nissa* (1833) 5 S.D.A. Rep. 262.

14. *Condaswamy Moodley v. McLeod* (1826) (unlawful restraint); *Totah Rungiah v. Chenchomma* (1824) 1 Mad. Dec. 482 (Madras, Sudder Court) (bailment). *Semlal Oodakishun v. Nainsook Soobaram* (1839) Sel. Rep. 196 (bailment).

15. *Krishto Mohum Ray—Applicant* (1840) 1 Sev. Sum. Cases 69.

16. *Mihirwanjee v. Wulubhdas* (1822) 2 Borr. 240.

questions of undue influence,¹ violence² or novation³ arose for their determination and were decided on sound principles of law though in a language different from the one used in these days.

As has been noted before, the Hindu law of contract was revived to a certain extent, though subject to the Regulations and Acts that might be passed by the Governors in Council or the Governor-General in Council. The principles of the Hindu law of contract were accordingly applied in causes coming before the Sudder Dewanny Adawlut,⁴ and obtained their recognition even in the Judicial Committee of the Privy Council.⁵ The usages⁶ and customs of the Hindus on the subject of contract were also given the force of law. The opinion of the Hindu law officers under the Hindu law of contract might thus be superseded by a trade award.⁷ Customs could thus determine the rate of interest payable.⁸

The peculiarities of the Hindu law of contract were accepted. The possession of the subject of an agreement was not necessary by the Hindu law as current in Mithila to give validity to such agreement. It was accordingly held by the Sudder Dewanny Adawlut at Calcutta that the agreement would be valid even without possession of the subject thereof.⁹ The *vyavashtha* of the Hindu law officers in case of contract involving earnest money was accepted though not in consonance with the rules of the English common law governing the matter.¹⁰

On the subject of contract, Hindu law was expressly applied in cases of bonds,¹¹ loans,¹² conditional acquittance of debt,¹³ surety,¹⁴ unjust enrichment¹⁵ and other allied heads. The principles of pious obligations regarding debts of the different schools of Hindu law were duly recognized.¹⁶ Modes of alienation of property not recognized by *shastras* were held to have created

1. *Manikchund v. Raja Gooroonaraen* (1806) 1 S.D.A. Rep. 165.
2. *Venkiah v. Vencatarauze* (1807) 1 Mad. Dec. 24.
3. *Ramchunder v. Bhugwan* (1824) Sel. Rep. 12.
4. *Sreenarain Rai v. Bhya Jha* (1812) 2 S.D.A. Rep. 23; *Ram Kewal Biswas v. Juggernath Biswas* (1835) 6 S.D.A. Rep. 19.
5. *Rajunder Narain Rae v. Bijai Govind Sing* (1839) 2 Moore Ind. App. 181 (P.G.).
6. *Dwalnath v. Kewal Ram* (1826) 4 S.D.A. Rep. 123.
7. *Brijhookundas Veerchund v. Kunnadas Belchurdas* (1823) 2 Borr. 234.
8. *Dada Bhaee Ruttunejee v. Nimmo* (1822) 2 Borr. 339.
9. *Sreenarain Rai v. Bhya Jha* (1812) 2 S.D.A. Rep. 23.
10. *Nursing Bhana v. Sunkerdas Mukundas* (1815) 1 Borr. 403.
11. *Rai Balgovind v. Sheikh Gholam Ali* (1805) 1 S.D.A. Rep. 93; *Jhyutee Ram Misser v. Raja Mhypal Sing* (1819) 2 S.D.A. Rep. 316 (security bond).
12. *Jamoonah Raur v. Mudden Day* (1785) Hyde's Notes, Sm. R. 143; *Banarassy Ghosh v. Ramtonoo Dutt* (1788) Chamb. Notes Sm. R. 144; *Manukchand Purbhoo v. Deokristn Tooligram* (1824) Sel. Rep. 9.
13. *Raja Jyporkas Sing v. Jug Rai Sahoo* (1811) 1 S.D.A. Rep. 343.
14. *Bhaee Shah Keshoor v. Rajkoonwur* (1812) 1 Borr. 93; *Chuttoobhoj Ramanooj Dass v. Mohunt Hurnerain Doss* (1841) 7 S.D.A. Rep. 15.
15. *Gopee Churun Bural v. Mt. Lukhee Tishwuree Dibia* (1821) 3 S.D.A. Rep. 93.
16. *Hurree Kusun v. Runchor* (1811) Sel. Rep. 10.

no title.¹ The concept of incapacity to contract of a Hindu minor and the non-liability of his surety was given its recognition.² Marriage contracts of the Hindus were governed by their personal laws and customs of the castes.³

The legal rates of interest under the Hindu law varied according to the caste or class of the borrower. The texts of the Hindu law regarding the limitation of interest as well as the invalidity or immorality of usurious loans and contracts had received different constructions in the hands of the different commentators. Regulations were also passed restricting interest as not to exceed the principal.⁴

The Hindu law of limitation as enunciated in the Hindu *shastras* was applied in cases of contracts of the Hindus. The different stipulations as to the period of limitation as under *Mitakshara*, *Katyayana* and *Vyasa* were noted.⁵ Regulations were also passed prescribing limitation for certain purposes.⁶

Contracts in the nature of champerty⁷ or tinged with illegality⁸ under the Hindu law were decided occasionally with reference to Hindu law. Questions of public policy and wager were also raised and determined.⁹ The principles of equity because of their nature could not be ignored where deemed applicable.¹⁰ See also under Section 1, *post*, *The English law in India*.

The Need for an Act

As it has been seen, the charters and statutes gave the East-India Company and later the Governors and Governor-General in Council power to make laws for the British territories in India. The British authorities in India also became the *de facto* and *de jure* sovereign power. It was recognized that when possession was taken of an uninhabited country, the settlers would introduce the laws of their own state; and that if a territory already peopled were acquired

1. *Kumla Kaunt Chuckerbutty v. Gooroo Govind Chowdree* (1829) 4 S.D.A. Rep. 322.

2. *Kallupnath Sing v. Kumlaput Jha* (1829) 4 S.D.A. Rep. 339.

3. *Nundlal Bhagwandas v. Tapeedas* (1809) 1 Borr. 14; *Huree Bhae Bhuwandeedas v. Chundun* (1812) 1 Borr. 392; *Khooshal v. Bhugwan Motee* (1815) 1 Borr. 138; *Deochund Natha v. Juwehur Behchur* (1823) 1 Borr. 528; *Kaseeram Jaetaram v. Bhugwan Poorshotum* (1823) 2 Borr. 432; *Mt. Ruliyat v. Madhowjee Panachund* (1824) 2 Borr. 680; *Kumla Buioo v. Muneeshunker Ichha-shunker* (1824) 2 Borr. 687.

4. *Rai Balgovind v. Sheikh Gholam Ali* (1805) 1 S.D.A. Rep. 93; *Baboo Moter Chund v. Mooftee Ubdoolah* (1823) 3 S.D.A. Rep. 261; *Khedoo Lal Khatri v. Rattan Khatri* (1830) 5 S.D.A. Rep. 10; *Besamber Ade v. Kalim Udden* (1831) 5 S.D.A. Rep. 81; Reg. XV of 1793.

5. *Suyud Ghoolam Ruza v. Aja Bhare* 1 Borr. 367; *Dhummunee v. Sonatun Sahoo* (1820) 3 S.D.A. Rep. 30.

6. Reg. III of 1793; Reg. II of 1805.

7. *Ram Ghohan Sing v. Keerut Singh* (1825) 4 S.D.A. Rep. 12; *Baboo Brijnerain Sing v. Rajah Teknarain Sing* (1836) 6 S.D.A. Rep. 131; *Mt. Zuhooroonnissa Khanum v. Raseek Lal Mitter* (1840) 6 S.D.A. Rep. 298.

8. *Keshov Rao Diwakur v. Naro Junardhun Patunkur* (1822) 2 Borr. 194 (contract for *shulk* (dowry)).

9. *Ramlall Thakoorseydass v. Soojamull Dhondmull* (1847) Perry's Notes, Case 18 (gaming).

10. *Shureef Ahmud v. Fakeer Sahib* (1821) 1 Mad. Dec. 280; *Lukmeedas Vereedas v. Mt. Mankoonwur* (1821) 2 Borr. 114 (idiocy); *Kumla Kaunt Chuckerbutty v. Gooroo Govind Chowdree* (1829) 4 S.D.A. Rep. 322.

by conquest or treaty, the existing laws of the territory which were not incompatible with English law, were continued, but these the King had a right to alter.¹ This *de jure* power was responsible for the Resolutions, Rules, Regulations, Orders and Acts affecting the people of India. It was at the same time provided, as seen before, that the Hindus and Mahomedans would be entitled to be governed by their personal laws in certain causes though the said saving in their favour was subject to the Regulations and Acts affecting or governing the said causes. It has also been seen that the English common and statute law became to some extent *proprio vigore* applicable in the three Presidency Towns of India. The rules of justice, equity, and good conscience were, in course of time, as has been seen, given an overriding force over the claims of the personal laws of the Hindus or Mahomedans. The Regulations, moreover, later did not require the Sudder and Mofussil courts to decide questions of contract by the native laws. The free exercise of the equity jurisdiction in the Supreme Courts and of the rules of justice, equity and good conscience in the Sudder and Mufussil courts was, in addition, responsible for the introduction, in the realm of contracts, of the English law on the subject. In course of time it could be said, therefore, though not accurately, while piloting the Indian Contract Bill in the Legislative Council, that the law of contract in India had been based on the English law on the subject though occasionally in the name of justice, equity and good conscience. The want of a definite and systematic law of contract was therefore keenly felt before the subject could be taken up by the Third Indian Law Commission.

The Indian Contract Act, 1872

The Indian Contract Bill was drafted originally by the (Third) Indian Law Commission constituted in December, 1861, and functioning in England. The Indian Contract Bill (to define and amend the law relating to contracts, sale of movables, indemnity and guarantee, bailment, agency and partnership) was substantially the Bill of the Indian Law Commissioners though some modifications had been made in it by the Select Committee here in India. The alterations which had been made in the Commissioner's draft occurred principally in the first part of the Bill, which treated of Contracts in General, and they were alterations in form rather than in substance, though they could not be regarded as unimportant.²

1. *Jebb v. Lefevre*, 1826; *Clarke's Additional Rules and Orders*, 1829, 58.

2. "The Bill which afterwards became the Contract Act was drawn in 1866 in England by the Indian Law Commissioners. In the following year it was introduced into the Council of the Governor-General during the absence of Mr. (later Sir Henry) Maine by the Right Hon. W. N. Massey, referred to a Select Committee, and published and circulated to the Local Governments. Thereupon, a controversy arose between the Secretary of State and the Commissioners on the one side, the Home and the Indian authorities on the other, as to the Commissioner's proposals that all penalties should be treated as liquidated damages, and that the ownership of goods may be acquired by buying them from any person who is in possession

The definition of contract as drafted by the Law Commission was changed to the existing one by the Select Committee. The proposed definition as drafted by the Commissioners read :

"A contract is an agreement between parties, whereby a party engages to do a thing or engages not to do a thing. A contract may contain several engagements and they may be either by the same party or by different parties."

The Hon'ble J. Fitzjames Stephen, member in charge of the Bill, gave in the Council a number of justifications for the change in this definition as suggested by the Select Committee. The Law Commission also provided that the ownership of goods might be acquired by buying them from any person who was in possession of them, if the buyer acted in good faith, and under circumstances which were not such as to raise a reasonable presumption that the person in possession had no right to sell them. While changing the proposed law to the one in the Bill the Hon'ble J. Fitzjames Stephen gave about ten justifications therefor. The only other matter of importance on which the Select Committee differed with the Commissioners was the question of liquidated damages. The law of England on the question whether, when a man promised in a certain event to pay a specified sum, he was bound or not to pay it in full, was rather intricate; and, in order to avoid that intricacy, the Commissioners proposed to enact that, in all cases, such penalties should be treated as liquidated damages. The Select Committee agreed that the intricacy should be removed by the converse operation of turning all the liquidated damages into penalties. This they proposed to qualify by an exception applying to the case of bail-bonds, recognizances, and the like, and to persons who, under the order of Government, gave bonds for the due performance of public duties.

The Bill in its rearrangement and reconstruction, and in some of the principles it asserted, owed much to the Hon'ble J. Fitzjames Stephen, the Member in charge, and Messrs David Cowie, J. R. Bullen Smith and R. Stewart.

The scope of the Bill was to bring the Indian law of contract, as far as might be, into harmony with the English law on the same subject, as established by recognized practice, by statute, and by the latest and best judicial decisions of the time. The (Third) Indian Law Commission drafting the original Contract Bill consisted of some of the most distinguished English lawyers. The deliberate opinions of English courts, formed after

of them, if the buyer acts in good faith, and under circumstances which do not raise a presumption that the possessor has no right to sell them, in other words, that every place in India should become a market overt. The result was that the Secretary of State permitted the Government of India to take their own course as to altering the Bill: the Commissioners resigned; and the Bill (whose early enactment was directed by the Secretary of State) was carried through the Council, with some important amendments, by Mr. (later Sir Fitzjames) Stephen."—Whitley Stokes: *Anglo-Indian Codes*, vol. 1 (1887), 534, Introduction to the Contract Act.

elaborate argument, and made with reference to numerous and varied precedents naturally formed a guide for the Commissioners concerned. In India, too, though justice, equity and good conscience were the law which the Judges were bound to administer, they in point of fact resorted to English law-books, for their guidance on questions on the subject. The Member in charge personally studied the Bill with great care and compared it chapter by chapter with the authorities on which it had been founded. He mentioned to Council that Chapter X of the Bill consisting of fifty-seven Sections had been distilled from *Story on Agency*. The chapter on the sale of goods representing the English law on the subject and condensed in forty-eight Sections had been similarly extracted from *Addison on Contracts*.

Though not a complete law of contract, the Bill was expected to suffice for a considerable time for the wants of the country. It was hoped that as deficiencies were discovered, it would be easy to enact supplementary chapters which might be read as part of it.

To the European community and particularly to that section of the European community as was engaged in industrial and mercantile pursuits, the codified law of contracts was most welcome. It rendered certain, clear and easily accessible much that hitherto had been doubtful, obscure and practically inaccessible. Before the administrators of the law also, the codified law would place in an accurate and compendious form much information with which it was highly expedient, and, indeed, absolutely necessary that they would be acquainted with.

Provision was made that special customs and incidents of individual branches of trade would not be affected by the measure so long as those customs and incidents were not opposed to the provisions of the codified law. This saving of the native customs and incidents notwithstanding, in so far as they did not conflict with the written law as embodied in the statute, the whole incorporation of the common law doctrines of England on the subject of the law of contract to the exclusion of an amount of consideration of the local conditions here could not satisfy the humanitarian statesmen of the time. His Excellency the Governor-General and Viceroy of India as the President of the Council and His Honour the Lieutenant-Governor of Bengal as a member thereof failed in their efforts to make any special provisions that might be considered as remedial measures for the ills prevailing in the Indian empire at the time. The Lieutenant-Governor felt constrained by the duty he owed to the people of this country, amongst whom he had spent the greater portion of his life, to move for the amendment of the Bill in respect of certain provisions which seemed to him to affect its very essence and substance in its practical working in this country. With reference to the subject of contracts His Honour observed that the only law in this country had been the law of justice, equity and good conscience. While admitting that the law which had hitherto been administered in that way must gradually take regular shape, he would not admit that the shape should be the English law. In the Indian law of contracts till then, His Honour observed,

there had not been yet far too great a tendency to drift into the English law. The Indian Courts had refused to admit English law where the peculiarities of such law appeared disagreeable. They had substituted for it what they considered to be a broader and safer and better law. The provision of the law to which he took exception was the simple and radical doctrine of the proposed new law that whatever a man promised that he must perform. This drastic proposition was not in the original draft of the Law Commission. It emerged from the Select Committee. In a country like India where men were not equal either socially, morally or intellectually; where they were not equally foreseeing or equally provident; where some were poor savages and others acute men of business; where there were vast differences between man and man, His Honour thought that a law which positively laid down such a broad proposition was likely to lead to great abuse and great injustice. It appeared to His Honour that it would amount to this, that however ignorant and low in the scale a man might be, if he once made a promise, he must perform it to the last drop of his blood and to the last day of his life. Thus the rigid rule of performance though a perfectly logical proposition would work very serious harm and very serious injustice in a community of unequals. It was therefore proper, His Honour thought, to give the Courts power to make such exceptions as they would deem equitable. The Courts should also be given power, His Honour thought, to make exceptions where there had been a mistake of law or of fact on the part of one of the parties to the contract. The law was considered a hard law putting as it did the ignorant and inexperienced into the hands of the clever and experienced. The people should be taught gradually that they should not be loose in making contracts and in fulfilling them. In a country of great extremes as India, the difficulties of rigid law were as great as the evils of the state of law as it stood. His Honour thought that the discretion given to the Courts, the Judges of which were appointed and chosen for their sagacity and learning, to decide on the merits of the bargain would be a lesser evil than to give them no discretion at all. His Honour accordingly proposed a series of amendments which without infringing the principle that a contract made must be performed, at the same time gave to the Court a certain power of mitigating the practical operation of the contracts as were of a hard and one-sided character.

In reference to His Honour's general complaint that the Bill was a hard one, the Hon'ble Mr. Bullen Smith said that a contract law must, from its very nature, be cast in a somewhat hard mould, and that any attempt to eliminate this element of hardness from it, would certainly tend to mar its usefulness and render it a weak, ineffective measure. The Hon'ble Mr. Robinson, too, thought that the policy of the law should be certain and unequivocal and the provisions for its enforcement impartially stringent. He also thought that the general effect of legislation on such a subject as contract should be educational. Neither did he think the English illustrations to be out of place in a *lex loci* for India.

His Honour the Lieutenant-Governor of Bengal had in view the unconscion-

able contracts entered into between landed proprietors and their tenants, between agriculturists and those who advanced on their crops, and between the capitalists who owned indigo, sugar and jute factories and those who grew the raw material. Mr. Stephen, member in charge of the Bill, while, opposing the proposal as made by the Lieutenant-Governor, explained that the adequacy of the consideration would be one of the elements to be taken into account in deciding whether or not a given contract had been freely made but would be no ground in itself for setting a contract aside. Hard bargains as such could not be disallowed by the Court.

His Honour the Lieutenant-Governor next drew the attention of the Council to the fact that throughout the Bill the drift of the illustrations was too much to show the English rules of law, and not the application which should be made of the provisions of the Bill to the circumstances of this country. If the Council were to adopt the system of illustration in the Bill, His Honour thought it was almost cowardly to refuse to adopt an illustration known to the country and to take illustrations from English law only. Reasonable illustrations taken from Indian practice would be, His Honour thought, explanatory, as opposed to the English illustrations which might be construed as only limiting illustrations. His Honour, therefore, in the first instance, asked the Council to accept a simple Indian illustration of what was called "undue influence".

His Honour the Lieutenant-Governor moved that the following illustration be added to Section 16:

"A, a rich and powerful zamindar, induces B, C and D, poor and ignorant ryots holding under him, to engage to grow certain produce and to deliver it to him for a term of twenty years, in consideration of an inadequate price for which no independent ryot would have so engaged. A employs undue influence over B, C and D."

His Excellency the President agreed with His Honour the Lieutenant-Governor entirely and thoroughly that a Bill for this country should be furnished with illustrations which touched on subjects which were familiar to the people. If an illustration suitable to the country was to be selected, it appeared to His Excellency that it must be selected from the field of that class of contracts in which undue influence or abuse was most likely to exist. There were two classes of contracts in which this description of abuse was most likely to occur: one of these classes were contracts by which persons bound themselves for an exceptionally long or unlimited period of time to give their labour, especially to planters and zamindars; and the other was a class of contracts by which a person engaged to raise a particular description of crop for an excessive number of years, and agreed to give the yield of the crop at stated prices. He thought that an illustration properly drawn and bearing on this question, might, most properly and advantageously, be introduced.

With reference to the abuses of contracts for labour, His Excellency presumed that those abuses had been provided for by special legislation which had the effect of protecting the poor, helpless and ignorant from inequitable

and unjust contracts. But there was no special legislation which affected the second class of contracts, in which the poor engaged to produce a particular description of cultivation and engaged to deliver the produce at fixed prices for excessive periods of time. He thought, therefore, that an illustration properly worded, with reference to this particular class of contracts, might be advantageously introduced into the law. He apprehended that, if a Bill of this kind went forth to the country without any reference to the descriptions of contracts under which it was alleged abuse and oppression had been carried on, he was not without apprehension that the publication of such a law without some illustration such as had been alluded to, might lead the poor to suppose that no amount of pressure exercised by unremunerative contracts, would have any effect in vitiating them; and he was not without apprehension that those who exercised oppression and took advantage of their position in reference to the poor, might think that this law recognized their doings and, in fact, vested them with greater power, and the consequence might be that they might hope to be able to carry on the practices previously complained of with great safety. His Excellency therefore considered that an illustration of that kind might be of the greatest advantage: it might give confidence to the poor and weak and inspire the rich and powerful with prudence, and he would therefore give his warm concurrence to an illustration couched in a judicious form.

His Honour the Lieutenant-Governor then proposed to substitute the following illustration for the amendment which he had at first proposed:

"A, a zamindar, by his influence, induces B, C and D, ryots holding under him, to engage to grow certain produce and to deliver it to him for an excessive term of years in consideration of a price obviously inadequate. A employs undue influence over B, C and D."

The thoughts of the humanitarian statesmen, namely, the Lieutenant-Governor of Bengal¹ and the Governor-General and Viceroy of India,² had had, however, no persuasive force over the mercantile members of the Council. The question being put,³ the Council divided—7 *Noes* and 4 *Ayes*. So the amendment was negatived. The only concession given to His Honour and His Excellency was that the English illustrations were omitted from Section 16.

The Scope of the Act

As it will appear from the above, the Indian Contract Act, 1872, is not exhaustive of the Indian law on the subject.

Amendments

Civil law was a Central Subject⁴ under the Government of India Act where

1. Sir George Campbell (1 March, 1871—7 April, 1874).

2. Lord Napier of Merchistoun (afterwards Lord Napier of Ettrick) (23 February, 1872—2 May, 1872).

3. 9 April, 1872.

4. Devolution Rules, as made under Section 54A of the Government of India Act, Schedule 1, Entry, 16.

the expression "The Government of India Act" meant not a separate Parliamentary enactment but a properly certified version of the Act of 1915 as subsequently amended. Sections 76 to 123 of the Indian Contract Act, 1872, forming Chapter VII: of Sale of Goods, thereof were removed by the Indian Sale of Goods Act, 1930.¹ Similarly, Sections 239 to 266 of the Contract Act forming Chapter XI: of Partnership, thereof were repealed by the Indian Partnership Act, 1932.²

Under the Government of India Act, 1935, "Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land" were a concurrent subject.³ Under the Constitution of India, too, the subject of the law of contract has been placed as item 7 of the Concurrent List (List III) in the Seventh Schedule to the Constitution.

A number of Acts and Adaptation Orders have been passed amending the Indian Contract Act, 1872, from time to time.⁴ The Act has also been occasionally amended by the Provincial or State Governments in exercise of the power devolved on them.

1. Section 65, *ibid.*

2. Section 73 and Schedule II, *ibid.*

3. Item 10 of List III in the Seventh Schedule.

4. See *The Indian Contract Act, 1872*, Government of India, Ministry of Law, *The List of Acts and Adaptation Orders amending the Act*. See above, page 9.

Act No. IX of 1872

[25th April, 1872]

THE INDIAN CONTRACT ACT, 1872¹

[As modified from time to time]

Whereas it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted
Preamble. as follows :

PRELIMINARY

Short title.—I. This Act may be called the Indian Contract Act, 1872.

It extends to the whole of India except the State of Jammu and Kashmir and it shall come into force on the first
Extent. Commence- day of September, 1872.
ment.

Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly
Enactments repealed. repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Whether the Indian Contract Act is Exhaustive

The Indian Contract Act in its preamble recites the expediency of defining and amending certain parts of the law relating to contracts. Though only a partial measure, the Contract Act is an amending as well as consolidating Act, and consequently beyond the reasonable interpretation on its provisions there are no means of determining whether any particular Section is intended to consolidate or amend the previously existing law.² Even when there was a fasciculus of Sections devoted to a subject, partnership, for example, the fasciculus was not considered exhaustive of all questions which could be

1. The marginal notes in this text have been printed as they appeared when the Indian Contract Act, 1872, was first promulgated for general information through the medium of the *Gazette of India*, 27 April, 1872. Alterations have been allowed only where they have been so introduced by Amending Acts.

2. *Ramdas Vithaldas v. Amerchand & Co.* (1916) 40 Bom. 630, 636 : (1915-16) 43 I.A. 164.

raised in connection with that subject. The Judicial Committee of the Privy Council, therefore, in construing some of the Sections of the Indian Contract Act, 1872, would not be guided by sheer rules of construction which might upset what had been considered by the commercial community as the law on the subject for a considerable period. In practice, their Lordships followed the English decisions as far as the cases would justify. The Indian Contract Act, 1872, not being exhaustive and dealing as it does with only certain parts of the law of contract, in cases where the law in terms is not applicable, the principles of English law, if applicable to Indian conditions, are applied as rules of justice, equity and good conscience.¹ *Jwaladutt v. Bansilal*² was a case where the Judicial Committee advised that persons dealing with a firm would not be affected by its dissolution, even where public notice thereof had been given by advertisement, unless they themselves had notice of such dissolution. The provision of Section 264 of the Contract Act could not be held to have provided otherwise. The provisions dealing with partnership of the Contract Act, as it then stood, were not found exhaustive.³ The decisions in India dating from 1882 were followed.

Notwithstanding some general expressions in the chapter on bailments, a common carrier's responsibility was not found to have been within the Contract Act, 1872.⁴ In 1878, the High Court of Bombay held⁵ that the effect of the Indian Contract Act, 1872, was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them "at all events," except in the case of loss or damage by the act of God or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike in the absence of special contract. In 1883 the same point was brought before the High Court of Calcutta. The case was referred to a Full Bench, and the Court came to the conclusion that the liability of common carriers was not affected by the Contract Act, 1872.⁶ The Contract Act does not profess, it was observed by the Judicial Committee,⁷ to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. Though treating of bailments in a separate chapter, the Contract Act does not show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts. The

1. *Devendrakumar v. Gulab Singh* A.I.R. 1946 Nagpur 114; *Irrawaddy Flotilla Co. v. Bugwandas* 18 Cal. 620; 18 I.A. 121; *Jwaladutt v. Bansilal Motilal* 53 Bom. 414; A.I.R. 1929 P.C. 132; 56 I.A. 174; 115 I.C. 707; *Kalyanji v. Tirkaram* A.I.R. 1938 Nag. 254; 176 I.C. 675; *Punjab National Bank v. Aruna Mal*, A.I.R. 1960 Punj. 632; *Morarji Premji v. Mulji Ranchhod Ved & Co.* A.I.R. 1924 Bom. 232.

2. A.I.R. 1929 P.C. 132, 134; (1928-1929) 56 I.A. 174.

3. *Chundee Churn v. Eduljee Cowasjee*, 8 Cal. 678, and *Irrawaddy Flotilla Co. v. Bugwandas*, 18 Cal. 620; 18 I.A. 121 relied on.

4. *Irrawaddy Flotilla Company v. Bugwandas*, (1891) 18 Cal. 620; 18 I.A. 121.

5. *Kuverji Tulsidas v. G. I. P. R. Company*, 3 Bom. 109.

6. *Moothora Kant v. I. G. S. N. Co.* 10 Cal. 166.

7. *Irrawaddy Flotilla Company v. Bugwandas*, (1891) 18 Cal. 620; (1891) 18 Cal. 620; (1891) 18 I.A. 121.

liability of common carriers in India was thus not found to have been affected by the Indian Contract Act, 1872. In the opinion of the Judicial Committee, the written law relating to that liability was left untouched by the Contract Act; and the unwritten law was not within its scope. In a comparatively recent decision, namely, *Orient Ship Supply Co. v. Kalamarsand Company*,¹ the law in question has been treated more fully. Koshi and Govinda Pillay, JJ., held that the duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject except where they have been departed from by special statutes like the Carriers Act, 1865, or the Railways Act, 1890, or the Carriage of Goods by the Sea Act, 1925, and that notwithstanding some general expressions in the chapter on bailments a common carrier's responsibility is not within the Contract Act, 1872. Contract to carry goods by sea on the deck of ship not being governed by any special statute, English Common Law rules apply and, therefore, it is open to the carrier to protect himself by appropriate clauses in a bill of lading from the liability for all kinds of loss or damage.

The Indian Contract Act, 1872, so far as it goes, is, in the opinion of the Judicial Committee of the Privy Council, exhaustive and imperative.² Thus obligations which are not strictly contractual obligations according to Section 2 of the Act are nevertheless governed by the Indian Contract Act because of their governance under Chapter V, that is, Sections 68 to 72 of the Act.³ Thus, to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* the statutory provisions of the Indian law.⁴ Only in cases of contract, when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein and/or without leading to strange and absurd results, it should be left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience.⁵ Subject to all these, the Privy Council as well as the High Courts in India disapproved of reading the Sections of the Indian Acts in the light of the English law. They observed that the language of the Sections of the Indian Acts should not be construed or enlarged by any implication of English decisions.⁶ The

1. A.I.R. 1951 T.C. 1, 4, 6, 7.

2. *Mohori Bhee v. Dhurmodas Ghose*, (1902) 30 Cal. 539, 548; (1902-1903) 30 I. A. 144.

See also *K. R. Chitguppi and Co. v. Vinayak Kashinath*, (1921) 45 Bom. 157; (1920) 58 I.C. 184.

3. See *Tan Bug Taim v. Collector of Bombay* A.I.R. 1946 Bom. 216.

4. *Satyabrata v. Mugneeram* A.I.R. 1954 S.C. 44, 47. *Ganga Saran v. Firm Ram Charan Ram Gopal* A.I.R. 1952 S.C. 9, 11. *Balabhdas v. Paikaji* (1917) 38 I.C. 915, 920.

5. *Naresh Chandra v. Ram Chandra* (1950-51) C.W.N. 765, 774, 775.

6. *Sheikh Md. Ravuther v. British India Steam Navigation Co. Ltd.* (F.B.) (1908) 32 Mad. 95, 126; (1908) 18 M.L.J. 497, 536 (Sankaran—Nair, J.); *Narendra Lal v. Emperor* (1909) 36 Cal. 166, 170; 13 C.W.N. 43; 9 Cr. L.J. 375; 1 I. C. 738; *Jagannada v. Prasad Rao* (1916) 39 Mad. 554; *Brojo Lal v. Sharajubala* 51 Cal. 745, 759; A.I.R. 1924 Cal. 864; 84 I.C. 154; *Ramanandi v. Kalawati* 55 I.A. 18 P.C.; 7 Patna 221 P.C.; A.I.R. 1928 P.C. 2; *Chhunna Mal v. Mool Chand* 55 I.A. 154 P.C.; A.I.R. 1928 P.C. 99; *Sharfuzzaman v. Hunter* A.I.R. 1930 Oudh 20; 121 I.C. 903; 60 O.W.N. 982; *Veerappa v. Emperor* 1930 M.W.N. 187; 31 M.L.W.

decisions of the English courts possess only a persuasive value and may be of help in showing how the courts in England have decided cases under circumstances similar to those which have come before the Indian courts.¹

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5. Stroud : *Judicial Dictionary*, vol. 4 (1953), 2855.

6. Wharton : *Law Lexicon*, 1953, 19. *The Dictionary of English Law*, vol. I (1959), 39.

liability of common carriers in India was thus not found to have been affected by the Indian Contract Act, 1872. In the opinion of the Judicial Committee, the written law relating to that liability was left untouched by the Contract Act; and the unwritten law was not within its scope. In a comparatively recent decision, namely, *Orient Ship Supply Co. v. Kalamarsand Company*,¹ the law in question has been treated more fully. Koshi and Govinda Pillay, JJ., held that the duties and liabilities of a common carrier are governed in India by the principles of the English Common Law on that subject except where they have been departed from by special statutes like the Carriers Act, 1865, or the Railways Act, 1890, or the Carriage of Goods by the Sea Act, 1925, and that notwithstanding some general expressions in the chapter on bailments a common carrier's responsibility is not within the Contract Act, 1872. Contract to carry goods by sea on the deck of ship not being governed by any special statute, English Common Law rules apply and, therefore, it is open to the carrier to protect himself by appropriate clauses in a bill of lading from the liability for all kinds of loss or damage.

The Indian Contract Act, 1872, so far as it goes, is, in the opinion of the Judicial Committee of the Privy Council, exhaustive and imperative.² Thus obligations which are not strictly contractual obligations according to Section 2 of the Act are nevertheless governed by the Indian Contract Act because of their governance under Chapter V, that is, Sections 68 to 72 of the Act.³ Thus, to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* the statutory provisions of the Indian law.⁴ Only in cases of contract, when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein and/or without leading to strange and absurd results, it should be left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience.⁵ Subject to all these, the Privy Council as well as the High Courts in India disapproved of reading the Sections of the Indian Acts in the light of the English law. They observed that the language of the Sections of the Indian Acts should not be construed or enlarged by any implication of English decisions.⁶ The

1. A.I.R. 1951 T.C. 1, 4, 6, 7.

2. *Mohori Bibee v. Dhurmodas Ghose*, (1902) 30 Cal. 539, 548; (1902-1903) 30 I. A. 144.

See also *K. R. Chitguppi and Co. v. Vinayak Kashinath*, (1921) 45 Bom. 157; (1920) 58 I.C. 184.

3. See *Tan Bug Taim v. Collector of Bombay* A.I.R. 1946 Bom. 216.

4. *Satyabrata v. Mugneeram* A.I.R. 1954 S.C. 44, 47. *Ganga Saran v. Firm Ram Charan Ram Gopal* A.I.R. 1952 S.C. 9, 11. *Ballabhdas v. Paikaji* (1917) 38 I.C. 915, 920.

5. *Naresh Chandra v. Ram Chandra* (1950-51) C.W.N. 765, 774, 775.

6. *Sheikh Md. Ravuther v. British India Steam Navigation Co. Ltd.* (F.B.) (1908) 32 Mad. 95, 126; (1908) 18 M.L.J. 497, 536 (Sankaran—Nair, J.); *Narendra Lal v. Emperor* (1909) 36 Cal. 166, 170; 13 C.W.N. 43; 9 Cr. L.J. 375; 1 I. C. 738; *Jagannada v. Prasad Rao* (1916) 39 Mad. 554; *Brojo Lal v. Sharajubala* 51 Cal. 745, 759; A.I.R. 1924 Cal. 864; 84 I.C. 154; *Ramanandi v. Kalawati* 55 I.A. 18 P.C.; 7 Patna 221 P.C.; A.I.R. 1928 P.C. 2; *Chhunna Mal v. Mool Chand* 55 I.A. 154 P.C.; A.I.R. 1928 P.C. 99; *Sharfuzzaman v. Hunter* A.I.R. 1930 Oudh 20; 121 I.C. 903; 60 O.W.N. 982; *Veerappa v. Emperor* 1930 M.W.N. 187; 31 M.L.W.

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The Contract Act and uncodified Indian Law relating to Contractual Obligations

In the absence of any conflict with the provisions of the Contract Act or any other Act, the Hindu and Mahomedan law of contract was left operative. Thus the rule of *damdupat* laying down that no greater arrear of interest can be recovered at any one time than what will amount to the principal sum was found operative, even after the enactment of the Contract Act, 1872, as between Hindus in the High Court of Calcutta in its ordinary original civil jurisdiction.³ It was applied as a part of the Hindu law of contract within the said jurisdiction. There was nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of *damdupat* from applying to mortgages between Hindus.⁴ The High Court of Calcutta has disallowed as between Hindus interest larger than the amount of principal in making up a mortgage account. The rule of *damdupat* applies only to cases where the debtor is a Hindu.⁵ The right of a mortgagee to sue for his principal and interest is a right arising from a contract, and must be taken to be made subject to the usages and customs of the contracting parties.⁶

1. *West Ham v. Fourth City Building Society* [1892] 1 Q.B.D. 654. *Brown v. G.W. Ry.* (1885) 9 Q.B.D. 753. *Argyll (Duke) v. I.R.C.* (1913), 109 L.T. 893. *Hall v. Arnold* [1905] 2 K.B.D. 543.

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6. *Jeevanbai v. Manordas*, (1911) 35 Bom. 199, 203.

Under the Mitakshara Hindu law there is annexed to each contract of debt, in which there is no agreement to pay interest, the term or incident that such loss shall be made up by the debtor, if he wrongfully withholds payment after demand. The governance of the parties by the Mitakshara School itself constitutes a special circumstance justifying the award of interest.¹ The operation of the rule of *damdupat* is applicable in case of a mortgage by a Hindu where no account of rents and profits is to be taken.² Its operation is, however, excluded in all mortgages the terms of which necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of the account may be.³ The rule of Hindu law, which limits the amount recoverable at one time by way of interest to the amount of the principal does not apply to an amount recoverable in execution of the decree of a civil court.⁴ The effect of the rule of *damdupat* is exhausted when the matter passes into the domain of judgment. In a suit on mortgage, for example, the court can in its judgment allow the plaintiff interest after the date fixed for redemption even though the amount which the plaintiff ultimately recovers in execution may exceed *damdupat*.⁵ In *Madhwa Sidhanta v. Venkataramanjulu*,⁶ the Madras High Court held that the operation of the *damdupat* rule was not affected by the enactment of the Indian Contract Act though the said rule was found inapplicable to cases of mortgage governed by the Transfer of Property Act. In *Subramania v. Subramania*, however, the said High Court decided that Hindu law was not binding in the matter of the payment of interest.⁷ *Annaji Rau v. Ragubai*⁸ and *Kamalammal v. Peeru Meera*⁹ were followed. *Saunadanappa v. Shivbaswa*¹⁰ was not followed.

The Contract Act and Usage or Custom of Trade

Any usage or custom of trade, like any incident of any contract, not at variance with the provisions of the Contract Act has been left unaffected by it. A usage is proved by the oral evidence of persons who become cognizant of its existence by reason of their occupation in the particular trade or business and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove a usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that everybody acknowledged it in the trade and knew of

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it, or might know of it, if he took the pains to enquire.¹ Evidence as to custom will be admissible provided it is not repugnant to the written contract or inconsistent with its expressed terms.²

How far a usage or custom of trade in India has been left unaffected by the Contract Act has been a vexed question since the enactment of the said Act in 1872. In 1878 the High Court of Bombay held in *Kuwerji Tulsidas v. The Great Indian Peninsula Railway Co.*³ that a usage or custom of trade inconsistent with the Contract Act was not saved by the said Act. In 1883 the same point was brought before the High Court of Calcutta. The case was referred to a Full Bench, and the Court came to the conclusion that the liability of common carriers, according to the usage or custom of trade, was not affected by the Contract Act of 1872. In the said Full Bench decision⁴, Garth, C. J., observed : "The Act only lays down certain general rules, which in the absence of any special contract or usage to the contrary, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business. These customs and usages have only the effect of introducing special terms into all contracts or dealings in any particular trade; their very object is generally to modify or control the general law; and the Contract Act in my opinion could never have intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with these rules." His Lordship observed that no *general* usage or custom of trade, that is, *no usage or custom pervading all trades*, inconsistent with the provisions of the Act, shall be valid. Any general usage of that kind would of course be equivalent to a *general law*; and no general law or usage in contravention of the general law laid down by the Act would be consistent with the validity of the Act itself. The said case of *Moothora Kant v. The India General Steam Navigation Co.* decided that the law relating to carriers in India was not affected by the Indian Contract Act. In support of this conclusion Prinsep, J., aptly cited Fitzjames Stephen, the member in charge of the Bill, which subsequently became the Indian Contract Act, 1872, as saying, while introducing the Bill : "We have omitted all reference to special branches of the law of contract which at present are regulated either by express legislation or recognized custom, e. g., the law of shipping, of bills exchange, insurance, master and servant, carriers, etc. This omission renders the present Bill so far incomplete, . . ."

In the case of *Irrawaddy Flotilla Company v. Bugwandas*,⁵ again, the said point had once more to be discussed. It was held that notwithstanding some

1. *G.H. Wittenbaker v. J.C. Galstaun*, (1917) 44 Cal. 917, 925; (1918) 43 I.C. 11.

2. *Ruttonsey Rowji v. Bombay United Spinning & Manufacturing Co. Ltd.* (1916) 37 I.C. 271.

3. (1878) 3 Bom. 109, 113.

4. *Moothora Kant v. The India General Steam Navigation Co.*, (1884) 10 Cal. 166, 185.

5. (1891) 18 Cal. 620; (1890-91) 18 I.A. 121.

general expressions in the chapter on bailments, a common carrier's responsibility was not within the Contract Act, 1872. That is, the liability of common carriers in India was not affected by the Indian Contract Act. The written law relating to that liability was untouched by the Act: the unwritten law was not within its scope. "Their Lordships may observe in passing", observed their Lordships, "and indeed it was admitted by the learned counsel for the appellants, that the words '*not inconsistent with the provisions of this Act*,' are not to be connected with the clause '*nor any usage or custom of trade*.' Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately precedes them." This observation of their Lordships as to the application of the phrase "*not inconsistent with the provisions of this Act*" as being only to the subject that immediately precedes it, namely, "*any incident of any contract*" should be treated only as *obiter*, for, the liability of a common carrier was interpreted by their Lordships only as an incident of a particular contract. It was conceded that the liability of common carriers as insurers was not a usage or custom of trade, and that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. This liability of a common carrier as an incident of a contract was, again, found not inconsistent with the provisions of the Act of 1872. The Judicial Committee of Her Majesty's Privy Council only advised that the Contract Act of 1872 was not intended to alter the law applicable to common carriers. There was no other question in the case.

The Indian Contract Act, 1872, received the assent of His Excellency the Governor-General on 25 April, 1872, and was first promulgated for general information through the medium of the *Gazette of India*, dated, 27 April, 1872.¹ In the said first official publication of the Act, the expression "*not inconsistent with the provisions of this Act*" at the close of Section 1 will be found to have been preceded by a comma.² The passage cited by Lord Macnaghten, delivering their Lordships' judgment, omitted the comma after the phrase "*any incident of any contract*," that is, immediately preceding the expression "*not inconsistent with the provisions of this Act*." This omission of the comma was responsible, it is submitted, for the unhappy construction as to the effect of the phrase "*not inconsistent with the provisions of this Act*". The admission of the learned counsel for the appellants that the words "*not inconsistent with the provisions of this Act*" are not to be connected with the clause '*nor any usage or custom of trade*' was further responsible, it may be submitted, for the like construction of the saving clause of Section 1 of the Contract Act. Though not formally acknowledged, the influence of punctuation, say, a comma, has made itself felt in many a decision. The following

1. *Ibid.*, Part IV, 153-185.

2. *Ibid.*, Part IV, 157. See also *Gazette of India*, Part IV, dated, May 4, 1872, 339, and *ibid.*, Part IV, dated, May 11, 1872, 513.

discussion¹ and illustrations will be considered relevant in the context:

For historical reasons, marginal notes and punctuation are not taken, technically speaking, as part of the statute in England.² The modern tendency however, is to read the statute as it reads. "Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason," said Lord Shaw, in *Houston v. Burns*,³ "for depriving legal documents of such significance as attaches to punctuation in other writings." Punctuations, accordingly, cannot be ignored unless when extremely necessary. The Constitution of the State of New York, Article III, Section 15, provides, for example, that statutes are to be enacted "*as printed and read*" instead of "*as read*." Hence, the New York State practice does not ignore punctuation.

That punctuation marks sometimes create troubles for the interpretation of documents and statutes cannot be disputed. The first paragraph of Section 8 of Article I of the American Constitution provides that—

"The Congress shall have Power—

1. To lay and collect Taxes, Duties, Imposts and Excises,⁴ to pay the Debts and provide for the common Defence and general Welfare of the United States:"

The meaning of the general welfare clause of this provision has been the subject of controversy ever since the earliest days of the U. S. Government.⁵ One of the questions which has arisen is as to whether or not the words "*to lay and collect Taxes*" conferred upon the Congress one separate and distinct power and the words "*to pay the Debts and provide for the common Defence and general Welfare*" conferred another separate and distinct power.

Mr. Justice Story in his *Commentaries on the Constitution of the United States* says that the Congress had no independent and general power to provide for the general welfare. If the clause, says he, "*to pay the debts and provide for the common defence and general welfare of the United States*" is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them and creates a general authority in Congress to pass all laws which they may deem for the common defence or general welfare. Under such circumstances the Constitution would practically create an unlimited national government.⁶

The contrary view has been maintained by former Congressman David J. Lewis, who discussed at length the history of the formulation of this clause

1. Urban A. Lavery : *Punctuation in the Law*, (1923) 9 A.B.A.J. 225-28.

2. *Wilkes v. Goodwin* [1923] 2 K.B. 86. *Nixon v. Att.-Gen.* [1930] 1 Ch. 566.

3. [1918] A.C. 337, 348.

4. Mark the comma after *Excises*.

5. For the controversy, see Charles S. Murphy, *Memorandum on the General Welfare Clause*: (Sen. Doc. No. 46, 79th Cong. 1st Sess. 1-3 [1945]). David J. Lewis : *H. Report 1800, 74th Cong. 1st Sess.*

6. See Joseph Story, *ibid.*, 2nd ed., 1851, vol. I, ch. xiv, Powers of Congress, pp. 629 *et seq.*

by the Constitutional Convention in his supplemental favourable report on the bituminous-coal-conservation Bill of 1935.¹

It is also interesting to recall a mistake in punctuation which largely negatived the intended provisions of the U. S. A. Tariff Bill many years ago. Among the articles scheduled for admission free of duty were "all foreign fruit-plants". In the Act this appeared as "all foreign fruit, plants." As a consequence, all foreign bananas, oranges, lemons, etc., were imported free of duty; and it was not until heavy loss had been suffered by the Revenue Department that the mistake was rectified by another Act.²

The Legislature of Illinois at its session of 1872 passed an Act giving judges certain increased powers in vacation, the Act providing among other things—"The several judges * * * shall have power, in vacation, to hear and determine motions to dissolve injunctions, stay or quash proceedings, etc."³

In 1874 the Legislature passed the so-called Revised Laws of Illinois which purported to codify the existing statutes and in the revision of the sentence just quoted a comma was somehow inserted after the word 'motions'. The insertion of the said comma was responsible for the growth of the famous case of *Hammock v. Farmers' Loan and Trust Co.* (1881)⁴ which is best known for establishing the rule that a real estate mortgage on a railroad carries with it the chattel property even against a later chattel mortgage. The Supreme Court of the United States held in the said case of *Hammock* that the extra comma would be ignored. The Supreme Court laid down the rule that punctuation in statutes had no meaning which the courts were bound to respect. "Punctuation is no part of a statute," the court said. The said Supreme Court in an earlier case of *The Lessee of Ewing v. Burnet* (1837)⁵, said: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when other means fail: but the Court will first take the instrument by its four corners, in order to ascertain its true meaning."

In *Cameron's Trustees v. Mackenzie*, 1915, S.C. 313, where a gift was made to "charitable institutions, persons, or objects," it was decided that the adjective "charitable" governed persons and objects as well as institutions, with the result that the gift was valid. A charitable person is one who needs or deserves charity.

The Supreme Court of India in *Aswini Kumar Ghose v. Arabinda Bose*⁶ rightly observed that when a statute was carefully punctuated and there was doubt in its meaning, a weight should undoubtedly be given to the punctuation. In *Ram Nandan v. State* (F.B.),⁷ too, the effect of punctuation has been recognized in the interpretation of a statute. In the said case it has been held that the

1. H. Report 1800, 74th Congress, 1st Session.

2. Russell: *Legislative Drafting and Forms*, (4th edn.), 1938, 94.

3. Ill. Laws 1871-2, 504.

4. 105 U. S. 77.

5. 11 Peters 41: 9 Law. Ed. 624 (1837).

6. A.I.R. 1952 S.C. 369, 383.

7. A.I.R. 1959 All. 101, 104.

expression *such law* in Article 19 (2) of the Constitution of India refers to both the expressions *any existing law* and *any law* occurring therein, and that the words "*in so far as such law imposes*" govern not only the immediately preceding words "*prevent the State from making any law*" but also the earlier words "*any existing law*." The ordinary rule that a qualifying phrase qualifies only the word that is nearest to it is thus subject to any indication to the contrary. The presumption, if any, in favour of the phrase "*not inconsistent with the provisions of this Act*" as qualifying only the subject that is nearest to it, namely, "*any incident of any contract*" will be found rebuttable when a reference shall have been made as to the intention¹ of the Legislature that passed the Indian Contract Bill. A perusal of the proceedings of the Legislative Council that passed the Indian Contract Act, 1872, will unmistakably show that "provision was made that special customs and incidents of individual branches of trade would not be affected by the measure so long as those customs and incidents were not opposed to the provisions of the codified law."

Earl T. Crawford in *The Construction of Statutes*² has summarized the effect of punctuation in the following terms :

"Of course, the punctuation of a statute may lend some assistance in its construction, but when the intention of the statute and the punctuation thereof are in conflict, the former must control even where the punctuation is regarded as a part of the statute.

.... But where a statute is ambiguous, its punctuation may and should be considered and given weight, especially where the Act is carefully punctuated. If the punctuation is in accord with the suggested meaning of the statute, it is an important additional reason for the acceptance of that meaning. It should be given weight, unless, from the inspection of the whole statute, it is apparent that the punctuation must be disregarded in order to arrive at the legislative intention."

It has also to be observed that where an Act is signed by the Governor, Governor-General, or President in a print complete with punctuation it will be a legitimate expectation that on all ordinary occasions a Section will be construed with the aid of its stops.³

From the above discussion it will appear that the construction of the Privy Council in *Irrawaddy Flotilla Company v. Bugwandas*⁴ as to the effect of the expression "*not inconsistent with the provisions of this Act*" has been neither in consonance with the rules of interpretation of statutes nor consistent with the intention of the Legislature.

The Contract Act because of its being a partial measure defining and amending only certain parts of the law relating to contracts, permits the Court to be inconsistent. The freedom is conceded either as a search for

1. For which see the Historical Background of the Indian Contract Act, 1872, *ante*.

2. *Ibid.*, 1940, Article 199.

3. See Russell : *Legislative Drafting and Forms*, (4th edn.), 1938, 94-95.

4. (1891) 18 Cal. 620.

the intention of the framers of the Act or as a proper understanding of the provisions of the Act itself, with the result that usages or customs of trade even when inconsistent with the provisions of the Act have been allowed to prevail,¹ and that it has also been held that the provisions of the Contract Act so far as they go are exhaustive and imperative.² But the question remains, how far do they go?

A standard of legal interpretation is the test applied by the law to words and to other manifestations of intention in order to determine the meaning to be given to them. Like an individual's legal act, an Act of the Legislature is made up of two elements,—an internal and an external one; it originates in intention, and is perfected by expression. There are several conceivable standards of analysing the nature of these two elements, and these standards are not always reconcilable. There being no established order of precedence between the various secondary canons of construction, in the event of a conflict between any two or more of them, it is not certain that the same canon will always be adopted. To quote Sharp and Galpin, although sometimes encouraging to the practitioner, this does nothing to facilitate the work of the text-book writer or editor.³

Contracts and Conflict of Laws

The parties to a contract may expressly select the law that will be governing their contract. When their intention to this effect is ascertained by an intention expressed in the contract itself, that intention will be conclusive.⁴ Where the parties by an express statement have selected the law governing the contract there is no difficulty.⁵ The parties are not however free to submit every aspect of their contract to any law that they may see fit to choose. Parties cannot by agreeing that their contract shall be governed by the law of a foreign country exclude the operation of a peremptory rule otherwise applicable to their transaction.⁶ Parties are not free to stipulate by what law the validity of their contract is to be determined.⁷ Thus, where a system of law has been chosen by the parties to a contract and that system has no real or substantial connection with the contract looked upon as a whole, the agreed intention will not avail.⁸ A party cannot confer capacity upon himself by deliberately submitting himself to a law to which factually

1. *Moothora Kant v. India General Steam Navigation Co.*, (1884) 10 Cal. 166, 185. *Irrawaddy Flotilla Company v. Bugwandas*, (1891) 18 Cal. 620 : (1890-91) 18 I.A. 121.

2. *Mohori Bibee v. Dhurmodas Ghose*, (1902) 30 Cal. 539, 548 : (1902-1903) I.A. 114. *Mugneeram v. Gurbachan*, A.I.R. 1959 Cal. 576, 579.

3. Preface to *Maxwell on the Interpretation of Statutes*, 10th ed., 1953.

4. *Rex v. International Trustee*, [1937] A.C. 500, 529 ; *Sujan Singh v. Gunga Ram* (1882) 8 Cal. 337.

5. *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 290 ; *State-Aided Bank of Travancore, Ltd. v. Dhrit Ram* A.I.R. 1942 P.C. 6.

6. *Mynott v. Barnard* [1939], 62 Comm. L.R. (Australia), 62, 80.

7. *Boissevain v. Weil*, [1949] 1 K.B. 482, 490.

8. *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 341 ; *Kahler v. Midland Bank*, [1950] A.C. 24.

the contract is unrelated.¹ In other words, all the material aspects of the contract will be governed by the proper law of the contract, for which see *infra*.

The mere making of a contract within the jurisdiction of a foreign court does not necessarily render that Court competent to adjudicate upon all the obligatory relations which flow directly from it.²

The Doctrine of the Proper Law³

The proper law of the contract is the law that determines the obligations under the contract.⁴ A particular law may however determine a particular question as raised in the proceedings arising out of a given contract. Thus, the questions, for example, whether agreement has been reached, whether the parties possess capacity, whether the contract is formally valid, or what interpretation is to be put upon a particular clause in the contract may not necessarily fall to be determined by the same law. The system of law which will govern most matters affecting the formation and substance of the obligation is called the proper law. The Court in an attempt to ascertain the system of law governing most matters of the contract will consider by what general law the parties to the contract intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter.⁵ By English law, the proper law of the contract is the law which the parties intended to apply.⁶ If no intention be expressed, the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances.⁷ In the absence of an express intention, the Court has to determine for the parties what is the proper law which, as just and reasonable persons, they ought to have intended if they had thought about the question when they made the contract. In seeking to determine the law the Court will have regard to the terms of the contract, the situation of the parties, and generally all the surrounding facts.⁸ In other words, the Court will accept that system of law as the proper law for a given contract with which the contract has the most substantial connection. The contract will be regarded as a whole. The relevant factors will obviously be many. The domicile and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made, and the

1. *Cooper v. Cooper* (1888), L.R. 13, App. Cas. 88, 108.

2. *Mathappa v. Chellappa* (1876-78) 1 Mad. 196.

3. G.C. Cheshire: *Private International Law* (5th ed.), 1957, 205-57; *ibid.*, 6th ed., 1961, 213-67.

4. *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, 240 P.C.

5. *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 120; *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1938] A.C. 224, 240.

6. *Vita Food Products Inc. v. Unus Shipping Co.*, [1939], A.C. 277, 280-90.

7. *Jacobs v. Credit Lyonnais* (1884), 12, Q.B.D., 589, 599-600; *Dhanrajmal Gobindram v. Shamji Kalidas & Co.*, A.I.R. 1961 S.C. 1285.

8. *The Assunzione*, [1954] P. 150, 175.

place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; matrimonial domicile in the case of a marriage settlement contract; the nationality of the ship in maritime contracts; the economic connection of the contract with some other transaction; the fact that one of the parties is a sovereign State; the nature of the subject matter or its *situs*, and, in short, any other fact which serves to localise the contract will be considered as relevant in ascertainment of the proper law.¹

In cases of conflict of laws, the proper law of a contract is the system of law by reference to which the contract was made or that with which the transaction has the closest and most real connection.² The parties to a contract may expressly choose a law with which the contract as such has the most real connection and not the law of the place with which the contract as such has no such connection.³ Where the parties have failed to lay down expressly in their contract the law applicable to it, the proper law of the contract is the law which the parties are presumed to have intended to apply. If the terms of the contract and the circumstances surrounding it do not enable an inference of the law which the parties presumably intended to apply to their contract, the task of the court will be to find out that law with which the contract has the most real connection.⁴ A contract may thus be governed by the law of the country where the *chose in action* is situated.⁵ The proper law is generally *lex loci contractus* or *lex loci solutionis*. Whether the proper law is the *lex loci contractus* or *lex loci solutionis*, in the absence of any expressed intention, is a matter of presumption.⁶ *Lex loci celebrationis* may also be the proper law in case of marriage.⁷ Once the nature and incidents of a union abroad between husband and wife have been determined according to the local law, the question whether or not the union is a monogamous marriage is to be determined, in England, according to English law.⁸ As it has been held in *Shahnaz v. Rizwan*, [1964] 2 All E.R. 993 Q.B.D., where the wife's right to dower was a right *ex contractu*, not derived from marriage, the claim to enforce it was not a claim for matrimonial relief. The contract for dower in such a case was, therefore, enforceable, even though it was entered into in contemplation of a potentially polygamous marriage.

1. G. C. Cheshire : *Private International Law* (5th ed.), 1957, 211-212 ; *ibid.*, 6th ed., 1961, 218-20.

2. *Bonthyon v. Commonwealth of Australia*, [1951] A.C. 201, 219 ; *In re United Railways of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007 : [1960] 2 All E.R. 332 : [1960] 2 W.L.R. 969.

3. *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 289-90.

4. *South African Breweries Ltd. v. King*, [1899] 2 Ch. 173, 183. *Rossano v. Manufacturers Insurance Co. Ltd.*, (1962) 2 All E.R. 214, Q.B.D.

5. *Fouad Bishara Jabbour v. Custodian of Absentee's Property, State of Israel*, [1954] 1 All E.R. 145.

6. *Dhanrajmal Gobindram v. Shamji Kalidas & Co.*, A.I.R. 1961 S.C. 1285.

7. *Lazarewicz v. Lazarewicz*, [1962] 2 All E.R. 5 P.D.A.

8. *Lee v. Lau*, [1964] 1 All E.R. 248, 252 P.D.A.

The intention of the parties will be ascertained by the intention, expressed in the contract, if any, which will be conclusive. "If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law : e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules but serve to give *prima facie* indications of intention. They are all capable of being overcome by counter-indications, however difficult it may be in some cases to find such".¹

It is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts.² The intention of the parties may even provide for the application of different legal systems to different parts of the contract. The said intention must be the intention of both, not of one party alone,³ and has to be exercised *bona fide* and for a lawful purpose.⁴ In cases where a contract is not immoral nor contrary to public policy, a solution of the question by what law the contract is to be governed is arrived at when it has been ascertained by what law the contracting parties intended it to be governed.⁵ Broadly speaking, "in English law all incidents of a contract, including capacity, form, essential validity or discharge (but excluding, perhaps, the legality of the contract⁶), are governed by.....the doctrine of the proper law⁷". The power of legislation to affect a contract by modifying or annulling its terms depends on the local situation of the debt.⁸

The question whether a contract has been discharged must be determined according to the proper law of the contract, and not according to the *lex situs* of a debt due and payable arising under the contract, if that law is different.⁹

1. *R. v. International Trustee*, [1937] A.C. 500, 554 ; *Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance, Ltd.*, [1938] A.C. 224, 240 ; *The Assunzione*, [1953] 1 W.L.R. 929, 933 ; affirmed [1954] 2 W.L.R. 234 ; [1954] P. 150, 185-6.

2. *Jacobs v. Credit Lyonnais*, (1884) 12 Q.B.D. 589, 599, 601.

3. *R. v. International Trustee*, [1937] A.C. 500, 557.

4. *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 290.

5. *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, 381.

6. *Kleinwort Sons & Co. v. Ungarische Baumwolle*, (1939) 108, L.J.K.B. 861, 866.

7. *Chitty on Contracts*, 21st Ed., 1955, vol. 2, page 272 ; *ibid.*, 22nd. Ed., 1961, vol. I, para. 1677.

8. *Kahler v. Midland Bank Ltd.*, [1949] 2 All E.R. 621 ; *Re Helbert Wagg & Co. Ltd. Re Prudential Assurance Co., Ltd.*, [1956] 1 All E.R. 129.

9. *Re United Railway*, [1957] 3 All E.R. 641.

A contract which is illegal by its proper law cannot be enforced in English Courts.¹ An action does not lie in England upon a contract which infringes the public policy of English law.² A contract which is valid by its proper law does not become unenforceable in England merely because it is illegal according to the *lex loci contractus*.³ An English Court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed.⁴ A contract is not unenforceable in England merely because its performance is illegal by the law of the country in which the promisor carries on his business or to which he belongs by nationality or domicile, provided that the contract is not subject in other respects to the law of that country.⁵

The law which governs a contract depends upon the intention of the parties express or implied. Where there is no intention expressed in the document, the Courts are left to the intention by reference to considerations as to where the contract has been made and how and where it has to be performed.⁶ The law which will govern a given contract is termed the proper law of the contract. The proper law of the contract means that law which the Court is to apply in determining the obligations under the contract. In deciding these matters, the law in England has refused to treat as conclusive, rigid or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract.⁷

1. *Heriz v. Riera* (1840), 11 Sm. 318; *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24; *Zionostenska Banka National Corp. v. Frankman*, [1950] A.C. 57.

2. *Boissevain v. Weil*, [1949] 1 K.B. 482 C.A., *affirmed* [1950] A.C. 327.

3. *In re Missouri Steamship Company*, (1889), 42 Ch. D. 321; *Jones v. Oceanic Steam Navigation Co. Ltd.*, [1924] 2 K.B. 730.

4. *Rex v. International Trustee*, [1937] A.C. 500, 519; *Kahler v. Midland Bank*, [1950] A.C. 24, 36. As to the inconclusiveness of this principle see *Cheshire, op. cit.*, 5th edn., 1957, 2, 237; *ibid.*, 6th ed., 1961, 266.

5. *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678; *British Nylon Spinners Ltd. v. Imperial Industries Ltd.*, [1955] Ch. 37.

6. *State-Aided Bank of Travancore, Ltd. v. Dhrit Ram*, A.I.R. 1942 P.C. 6. *Dhanrajmal Gobindram v. Shanji Kalidas & Co.*, A.I.R. 1961 S.C. 1285.

7. *Brijraj v. Anant Prasad*, A.I.R. 1942 Cal. 509; *Benirani & Co. v. Debono*, [1924] A.C. 514; 93 L.J.P.C. 133; 131 L.T.L.; *Mouni Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.*, [1938] A.C. 224; 107 L.J.P.C. 5; [1937] 4 All E.R. 206; 157 L.T. 522; 54 T.L.R. 5.

Where questions arise as to whether the incidents of a contract should be governed by the law of one country or another, the general rule is that all the rights and incidents arising under the contract are governed by the proper law of contract, and in a given case the law of the contract may be the law of the place where the contract was made.¹ Proper law is the law that obtains not when the contract was made and the obligation fashioned but the law in force at the time when performance is due. A proper law intended as a whole to govern a contract is administered as a living and changing body of law, and effect is given to any changes occurring in it before performance falls due.² Where the contract is made in Calcutta whatever be the nationality of the parties, say, the carriers by sea, they will be governed by the *lex loci contractus*.³ One of the incidents which is governed by the law of the contract is the method of discharge of the contract. Where the law of one of the States of India is distinct from the law of another State, the two States are regarded for the purpose of the conflict of laws as foreign States, *inter se*. The proper law of a contract, such as a debt incurred under a promissory note made in Bombay, will be the law in force in the State of Bombay, and the debt cannot be discharged by a method recognised in the Madhya Pradesh but not in Bombay. A discharge of such debt under the Central Provinces Debt Conciliation Act was not considered a defence to the suit filed in the Nandurbar Court in Bombay.⁴ Similarly, the Bengal Moneylenders Act did not apply to a loan on a promissory note made in Bihar, but payable either at Calcutta or in Bihar, where the intention of the promissory note was that the transaction should be governed by the law of Bihar.⁵ The validity, interpretation and effect of a contract of affreightment are governed by the proper law of the contract. The proper law of a contract of affreightment is the law by which the parties intend that their contract should be governed. When the intention of the parties to a contract as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract. Where a clause in a bill of lading contained a provision that all suits relating to goods consigned from the port in British India to a port outside British India and *vice versa* would be filed only in British India, it was held that parties intended that the contract of affreightment should be governed by the law prevailing in British India.⁶ Similarly, where the arbitration clause indicated an arbitration in India, it led to an inference that the parties adopted the law of India.⁷

1. *Shanker Vishnu v. Maneklal Haridas*, A.I.R. 1940 Bom. 362, 363; *Mackillican v. The Compagnie des Messageries Maritimes de France*, (1881) 6 Cal. 227.

2. *Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh*, A.I.R. 1955 S.C. 590.

3. *Hajee Ismail Sait v. The Company of the Messageries Maritimes of France*, (1905) 28 Mad. 400.

4. *Shanker Vishnu v. Maneklal Haridas*, A.I.R. 1940 Bom. 362, 363.

5. *Brij Raj v. Anant Prasad* (1942) Cal. vol. I, 505; A.I.R. 1942 Cal. 509.

6. *Orient Ship Supply Co., Ltd. v. Kalamarsand Company, Steamship Company*, A.I.R. 1951 T.C.

7. *Dhanrajmal Gobindram v. Shamji Kalidas & Co.*, A.I.R. 1961 S.C., 1285.

A contract is to be governed by the law of the country where it is to be performed.¹ The mode of performance of a contract is to be governed by the law of the place of performance.² The personal incapacity of an individual to contract depends on the law of the place where the contracting party is domiciled.³ The mode of proof of the contract (as being a matter of procedure) is governed by the *lex fori*, the law of the place where the action is brought.

The rights of the parties to a contract are to be judged by that law which they intended, or rather by which they may justly be presumed to have bound themselves. The parties must be taken to be bound by the law as they understood it, in relation to a contract, at the time when the contract was made.⁴

The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; and not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. If there be a bankruptcy law, or any other law of such country by which a person who would otherwise be liable under the contract would be discharged and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. This rule is only applicable when any change of law in the country in which the contract was made is not repugnant to the principles of the Indian Constitution, or to those principles of justice, equity and good conscience on which the Indian *lex fori* is founded. If so repugnant, the change of law will not be applied by Indian Courts.⁵

In *Blohn v. Desser*, [1961] 3 W.L.R. 719 Q.B.D., the defendant was a partner in a partnership firm in Vienna and her name was registered as such in the commercial register in Vienna, though she was only a sleeping partner receiving no income from the firm, and at all material times was resident in England. *Held*, that the defendant, as a partner in the firm, was regarded as having carried on business in Vienna through an agent resident there and that, having permitted those matters to be notified to persons dealing with the firm by registration in a public register, she had *impliedly* agreed with those persons to submit to the jurisdiction of the Court of Vienna and that, therefore, the English Courts would recognise the judgment, where any, of such court. English courts do not recognise or enforce directly or indirectly a

1. *Cox v. The Governors of Bishop Cotton's School*, Punjab Record, vol. IX, 271, (1874) Civil Judgments No. 85.

2. *Mayor, Councillors and Citizens of the City of Auckland v. The Alliance Assurance Co., Ltd.*, 167 I.C. 337; [1937] A.C. 587; A.I.R. 1937 P.C. 54, 59 (a case from New Zealand).

3. *Lachmi Narain v. Fateh Bahadur*, (1903) 25 All. 195, 202.

4. *Abdul Aziz v. Appayasami*, (1904) 27 Mad. 131, 142; (1903-04) 31 I.A.I.

5. *Raman Chettiar v. Raman Chettiar*, A.I.R. 1954 Mad. 97; *Antony Gibbs and Sons v. La Societe Industrielle et Commerciale Des Metaux*, (C.A.) (1890) 25 Q.B.D., 399, 405.

foreign revenue law or claim.¹ But, as it has been noted in *Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd.*, [1964] 3 All E. R. 326 C. A., when a question arises as to the validity of the laws of a foreign country it will be the duty of the Court to take notice of it.

The English Law in India

Subject to later laws, whether of the British Parliament or of the Governor General in Council of India, or the Governors, the law *factually* administered by the Courts at the three Presidencies was, theoretically, the law of England as it stood at the introduction of each of the Charters of 1723, and 1753, that is to say, for the period of 1723 to 1753, it was the law of England as it stood in the year 1723, and from 1753, onward as the same law stood in 1753.²

As to the applicability of the English statute and common law in the three Presidencies the only doubt expressed had been whether the condition and circumstances of the place and the persons in India admitted of the law being administered as in England. The *quaere* was whether the English law obtaining in England was introduced *sub modo* in the three Presidencies of India. The resultant of the doubt in question was that the Privy Council as well as the High Courts at the Presidencies in India applied the English common law as it was found applicable to Indian society and circumstances. That is to say, subject to the Indian laws, orders, rules and regulations, the English law was applied in India in so far as the said law was deemed consonant with the rules of justice, equity and good conscience as viewed on the background of the Indian society and circumstances.³

Apart from the fact that *apropos* the Charter of 24 September, 1726, copies of English laws, text-books and detailed instructions⁴ were sent by the

1. *Rossano v. Manufacturers' Life Insurance Co.* [1962] 3 W.L.R. 157 Q.B.D.

2. See Patra, *The Administration of Justice under the East-India Company in Bengal, Bihar and Orissa*, Bombay, 1961; London & New York, 1962, Section VIII: Laws in Operation.

3. *Mayor of Lyons v. East-India Company* (1836-37) 1 Moo. I.A. 175, 271. *Webbe v. Lester* (1864-66) 2 Bom. H.C.R. 2nd ed., vol. 2, 56, 60. *Anandray v. Ravji Dashrath* (1864-66) 2 Bom. H.C.R. 214, 218. *Juttendromohun Tagore v. Ganendromohun Tagore* (1872-73) I.A. Supplemental 47, 64. *Parum Shook Doss v. Rasheed Ood Dowlah* (1871-74) 7 Mad. H.C.R. 285, 287. *Khushalchand v. Mahadevgiri* (1875) 12 Bom. H.C.R. 214, 216. *Dorab Ally Khan v. Abdool Azeez* (1877-78) 5 I.A. 116, 126. *Mithibai v. Lamji Nowroji Banaji* (1881) 5 Bom. 506. *Parvathi v. Mannan*, (1885) 8 Mad. 175, 178. *Lopez v. Lopez* (1886) 12 Cal. 706. *Waghela Rajsanji v. Shekh Mastudin* (1886-87) 14 I.A. 89, 96. *Bhagwat Dayal v. Debi Dayal* (1907-8) 35 I.A. 48. *Mahomed Musa v. Aghore Kumar Ganguli* (1914-15) 42 I.A. 1, 8. *Debnarayan Dutt v. Chunilal Ghose* (1914) 41 Cal. 137. *Kerwick v. Kerwick* (1919-20) 47 I.A. 275. *Manzur Hasan v. Muhammad Zaman* (1924-25) 52 I.A. 61, 67. *Chhatra Kumari v. Mohan Bikram Shah* (1930-31) 58 I.A. 279, 297. *Kshirodebihari Datta v. Mangobinda Panda* (1934) 61 Cal. 841

4. For the guidance of the Courts established by the Royal Charter of 24 September, 1726, detailed instructions, entitled "Instructions for putting in Execution the East-India Company's Charter," were sent to Fort William. See para. 11 of the Court of Directors' Letter to Bengal, 17 February, 1748-1749. See also the Manuscript Proceedings of the Mayor's Court at Calcutta, dated 20 July, 1749, cited, Patra, *op. cit.*, p. 41.

Court of Directors to the Company's governments at the Presidencies in the matter of judicial administration there, the very fact that the Company were given the power, through the medium of Charters and Grants,¹ to make and alter laws for the administration of their management as well as the territories under them and that such laws, whether as rules, laws, constitutions, orders, ordinances, regulations or judicial decisions had to be reasonable and could not be contrary or repugnant to the laws, statutes and customs of the English realm for the time² will entitle one, it is submitted, to hold that the English statute, case and common law were introduced in the Presidencies in India. This position continued from the time of the Charter of 31 December, 1600, till the Charter Act of 1833. Only after 1833, the laws in Company's India could differ from the laws of the English realm. Even in 1773 and 1781, the British Parliament by statutes modified the operation of the English laws in their application to the Company's territories in India. That is to say, subject to express exceptions,³ the English statute, case, common, and civil law became *sub modo* the law also of the Company's possessions in India.⁴

It will be an absurdity to hold that *all* the statute, case and common law obtaining at a particular date, whether 1723 or 1753, in England became *proprio vigore* also the law of the Presidencies of Fort William, Fort St. George and Bombay. It will also be unhistorical and unfunctional, on the other hand, to assert that the said English laws were not introduced in the Presidencies. The Courts at the three Presidencies were, mostly, of the view that English statute, case and common law were introduced in their jurisdictions subject, where necessary, to modifications. It will be an interesting study, it is believed, to refer to a few judicial decisions to illustrate the position. Sir William Blackstone in his *Commentaries on the Laws of England*, London, 1876, 4th ed., vol. I, pages 81-82, observed :

"Colonists carry with them only so much of the English laws, as is applicable to their own situation and the condition of an infant colony ; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions...are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in case of dispute be decided in the first instance by their own provincial judicature, subject to the revision and control of the sovereign in council.

1. The Charters of 31 December, 1600; 31 May, 1609; 3 April, 1661; 27 March, 1669; 9 August, 1683; and 7 October, 1693; 13 Geo. III. c. 63; 37 Geo. III. c. 142; and 47 Geo. III. Sess. 2. c. 68, for examples.

2. The position was the same, beginning from the Charter of 31 December, 1600, till 3 and 4 William IV. c. 85.

3. See the Charter of 1753; 21 Geo. III. c. 70; 37 Geo. III. c. 142; Charter of Justice of the Supreme Court at Madras; Charter of Justice of the Supreme Court at Bombay.

4. See *Advocate-General of Bengal v. Ranee Surnomoye Dossee* (1861-4) 9 Moo. I.A. 387, 426-427; *Collector of Masulipatam v. Cavalry Vencata Narrainapah* (1859-61) 8 Moo. I.A. 500, 525-27; see also *ibid.*, 529.

Mahomedan¹ principles of equity, as distinguished from the English, were given their due consideration. In *Dorab Ally Khan v. Abdool Azeez*, (1877-78) 5 I.A. 116, it was observed that there was not in India the difference between real and personal estates which obtained in England.² The English law as to maintenance and champerty was not applicable to India.³ In *Mahomed Musa v. Aghore Kumar Ganguli*, (1914-15) 42 I.A. 1, equity, that is, the conduct of parties in the instant case, was held as to have cured the defects of form.⁴ The rules of Courts of Equity in England as to allowance to a mortgagee in possession were not applied in India.⁵ The law applied by the Court of Chancery in England was however considered, *prima facie*, applicable in India but for the establishment of a contrary intention. The presumption of the introduction of the said law in India was rebuttable.⁶ The common law rights of Muslims in India were recognised. The distinction between indictment and action as in the English law was held inapplicable in India.⁷

Subject to above, it may be observed that the Courts established under the Charter of 24 September, 1726, while giving judgment and sentence according to justice and right could not, broadly speaking, pronounce judgments contrary to reason or contrary or repugnant to the English case, common, civil and statute law or customs. Functionally speaking, whatever was introduced as the law by the authorities or accepted by the Courts as the law, continued to be the law of the land. The law stayed on where it had once fallen, unless impliedly or expressly modified⁸ or removed by laws subsequently enacted or laid down by competent authorities, inclusive of courts. The common law is to be sought in the expositions and declarations of it, in the decisions of the Courts and in the writings of lawyers. The Courts have first

1. *Moulouee Syud Ashruf Ali v. Mirza Kasim* (1820) 3 S.D.A. Rep. 49. *Mirza Beebee v. Toola Beebee* (1829) 4 S.D.A. Rep. 334. *Mt. Hingoo v. Meer Furzund Ali* (1828) 4 S.D.A. Rep. 307. *Hidaet Ali Khan v. Hissam Ali Khan* (1839) 6 S.D.A. Rep. 257.

2. Sir James W. Colville, *op. cit.*, p. 126.

3. *Bhagwat Dayal v. Debi Dayal* (1907-8) 35 I.A. 48 (Sir Arthur Wilson, at p. 56).

4. Lord Shaw of Dunfermline, at p. 8.

5. *Anandray v. Ravji Dashrath* (1864-66) 2 Bom. H.C. 214 (Newton, J. p. 218).

6. *Kerwick v. Kerwick* (1919-20) 47 I.A. 275.

7. *Manzur Hasan v. Muhammad Zaman* (1924-25) 52 I.A. 61 (Lord Dunedin, p. 67).

8. As to the modification of the law to be administered in the three Presidencies, *see* Charter of 1753; 21 Geo. III. c. 70; 37 Geo. III. c. 142; Charter of Justice of the Supreme Court at Madras; and the Charter of Justice of the Supreme Court at Bombay. As to the laws for the mofussil, *see* Rule 23 of the Hastings's Plan of 1772; the first Regulation as was passed on 17 April, 1780; Bengal Judicial Regulation VI of 1781; Regulation IV of the Bengal Code, 1793, Regulation VIII of 1795; Regulation III of 1803; Regulation VII of 1832; Bombay Regulation IV of 1799; Bombay Regulation II of 1800; and Bombay Regulation IV of 1827, for examples.

It will be recalled that Section 18 of the East-India Company Act, 1780 (21 Geo. 3. c. 70) and Section 12 of the East-India Act, 1797 (37 Geo. 3. c. 142), containing savings for native law and custom, though rendered obsolete by subsequent laws, were repealed as late as in 1935, under Section 301 of the Government of India Act, 1935 (26 Geo. 5 & 1 Edw. 8. c. 2). As to the large number of British Statutes forming, till recently, a part of the statutory law of India, *see* the British Statutes (Application to India) Repeal Act, 1960, *Schedule*.

to find what is the common law and to apply it to new and ever varying sets of fact and circumstances. New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. When any part of the common law is found to require amendment, the legislature alone is competent to apply the remedy.¹ The High Courts of Judicature as well as the Judicial Committee of the Privy Council, the Federal Court of India, and the Supreme Court of India could and can ascertain the common law of the land in course of their judicial pronouncements. In the realm of common law, judicial precedents will prevail against statements of jurists. In cases of conflict in *rationes*, subject to the rules of hierarchy of courts, the statements that are posterior will prevail. The pronouncements made by the Privy Council till its jurisdiction in respect of Indian appeals and petitions was abolished under the Abolition of Privy Council Jurisdiction Act, 1949², continue to be binding over the High Courts and other Courts of India.³ Only the Supreme Court of the land can override them, the Supreme Court of India being the highest Court of law of the land and in view of the declaration under Article 141 of the Constitution of India to the effect that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

(a) **"Proposal"**.—Where one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal ;

(b) **"Promise"**.—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise ;

1. *Hopper & ors. v. Corporation of Liverpool* (V. C. of the Palatine Court of Lancaster), (1944) 88 S.J. 213, cited, Nathan's *Equity through Cases*, (4th ed.), 1961, p. 269.

2. See The Abolition of Privy Council Jurisdiction Act, 1949 (Constituent Assembly Act No. 5 of 1949), Sections 2 and 4.

3. It is submitted that the observation of M. C. Setalvad in *The Common Law in India*, Hamlyn Lectures, 1960, p. 49, to the effect that "...the decisions of the Privy Council are no longer binding authority after the Constitution of 1950" is not correct. See Section 212 of the Government of India Act, 1935, and Section 18 of the Indian Independence Act, 1947. The position is that the decisions of the Privy Council like those of the Federal Court continue to be binding on the High Courts and other lower Courts in India until such decisions are overridden directly or impliedly by pronouncements of the Supreme Court of India or by legislation by competent authorities. Article 372 of the Constitution of India provides for the continuance in force of existing laws, including common law, in given circumstances. See also Article 13 of the Constitution of India. *Air Carrying Corporation v. Shibendra*, A.I.R. 1964 Cal. 396.

(c) **“Promisor” and “Promisee”**.—The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee”.

(d) **“Consideration”**.—When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise ;

(e) **“Agreement”**.—Every promise and every set of promises, forming the consideration for each other, is an agreement ;

(f) **“Reciprocal Promises”**. - Promises which form the consideration or part of the consideration for each other are called reciprocal promises ;

(g) **“Void Agreement”**.—An agreement not enforceable by law is said to be void ;

(h) **“Contract”**.—An agreement enforceable by law is a contract ;

(i) **“Voidable Contract”**.—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract ;

(j) **“Void Contract”**.—A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Section 2 (a) : Proposal

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, one is said to make a proposal. A proposal is sometimes called an offer. A proposal to be capable of acceptance must involve a definite promise by the offerer that he will bind himself if the exact terms specified by him are accepted. If an offer takes the form of a promise in return for an act, the performance of that act is in itself an adequate indication of assent. A proposal may be made either to a particular person or to the public at large.¹ A proposal, which when accepted becomes a promise, is thus either special or general. A special proposal is one made to a person who is in the first instance ascertained. A general proposal, on the other hand, is one made to all those to whose knowledge it comes, as, for example, where a

1. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

reward for lost property is offered by advertisement in a newspaper. In such a case the proposal is accepted by performance of its conditions.¹

Quotations of prices or the usual advertisements are not proposals in the sense of Section 2 (a) inasmuch as they are not made with a view to obtaining the assent of anybody to such quotation or advertisement.² A quotation submitted by a trader as the basis of a possible order from customers is thus distinct from an offer to sell, which if accepted, creates a contract for the breach of which damages may be recovered.³ The court will see whether any firm offer has been made by such quotations or advertisements. In the absence of a definite offer the case will be interpreted as an invitation to treat. When, on the other hand, a definite offer has been made either to a particular person or to the public at large, say, in an advertisement of rewards for services to be rendered, and that particular person or a member of the public may be taken to have accepted the offer thus definitely made, the said firm offer will ripen into a contract. In the case of an advertisement, in given circumstances, an offer may thus be made to all the world, and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.⁴ But when the so-called offer does not consist of a definite promise to bind the offerer on the acceptance on the part of an offeree of certain specified terms, it will be treated by the court as only an offer to negotiate, an offer to receive offers, and nothing more. An invitation to treat is not an offer capable of conversion into a contract by acceptance, but represents a process of negotiation that precedes the making of a definite offer. The display of goods in a shop with price attached is only an invitation to treat.⁵ The issue of a price-list advertising goods for sale is not an offer to supply any quantity of the goods at the scheduled prices. It is an attempt to induce offers and not an offer in itself, legally speaking.⁶ An order given on the basis of the said advertisement will therefore not result in a binding contract to supply any given quantity of the goods advertised or priced. When, however, a quotation of a certain quantity at a certain price was coupled with the observation 'I shall be glad to hear if you are buyers', it was interpreted as an offer.⁷ Thus in *Alexander Philp & Co. v. Hugo Knoblauch*, 1907, Session Cases, 994, the merchant's letter was held an offer to sell, and not merely a quotation of price, and this offer was held as accepted so as to constitute a concluded contract by the oil-millers' Telegram, although it did not expressly refer to the condition of the terms mentioned in the offer.

1. Whitley Stokes : *Anglo-Indian Codes*, vol. I, 1887, 493 : Introduction to the Contract Act. See also S. 8, *post*.

2. *Secretary of State v. Madho Ram*, (1928), 10 Lah. 493, 502 : A.I.R. 1929 Lah. 118.

3. *Mylappa Chettiar v. Mohamed Shirazee*, 27 Mad. L.J. 712.

4. *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q.B. 484, *affirmed*, [1893] 1 Q.B. 256.

5. *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern), Ltd.* [1952] 2 Q.B. 795.

6. *Grainger & Son v. Gough* [1896] A.C. 325, 334.

7. *Philp & Co. v. Knoblauch* 1907 S.C. 994.

Harvey v. Facey, L. R. [1893] A. C. 552, was distinguished and explained. Subject to such particular cases, it will be wrong to say that a shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer'. In most bookshops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says, 'yes'. That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer'. Similarly, the mere fact that a customer picks up a bottle of medicine from the shelves in a 'self-service' shop does not amount to an acceptance of an offer to sell. In the words of Lord Goddard, it is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price.¹ The mere statement of the lowest price at which the vendor could sell contains no implied contract to sell at that price to the persons making the inquiry.² It is taken only as a preliminary statement as to price. It signifies only a person's intention or a declaration of his willingness to enter into negotiations. Thus, a term in a partition deed that in the event of anyone of the brothers wishing to sell his share of the house he should sell it to the other brothers at the market value is not an offer in itself but merely an undertaking to make an offer of sale upon the arising of a certain contingency.³ A letter requesting a loan of money and promising repayment with interest on a certain day is only a proposal for a loan and not a concluded contract in order to form a promissory note.⁴

Illustration.—On a letter from a party requiring about particulars of interest on deposits, the bank sent a quotation of rates of interest and forms to be filled by the party. The party filled in the forms and sent the money as deposit. The bank accepted the money and sent back a receipt to the party. It was held that the bank's letter with quotations was not an offer but only a quotation of business terms. The contract was made by the offer by the party in the opening form accepted by the bank by the issue of the deposit receipt.⁵ A circular sent by a Bank to its constituents read: "The Bank has decided to conform to the minimum interest rates stipulated by the Calcutta Exchange Banks. You are by this letter informed that

1. *Pharmaceutical Society v. Boots Cash Chemists* [1952] 2 Q.B. 795; [1952] 2 All E.R. 456, affirmed [1953] 1 Q.B. 401; [1953] 1 All E.R. 482.

2. *Harvey v. Facey* [1893] A.C. 552; 62 L.J. P.C. 127; *Clifton v. Palumbo* [1944] 2 All E.R. 497. *McPherson v. Appanna*, A.I.R. 1951 S.C. 184.

3. *Pooran Singh v. Krishna Bai*, A.I.R. 1951 Mad. 396; see also below.

4. *Narayanasami v. Lokanibalammal* (1897) 7 Mad. L.J. 220; *Dhondbhat v. Atmaram*, (1889) 13 Bom. 669.

5. *State Aided Bank of Travancore, Ltd. v. Dhrit Ram*, A.I.R. 1942 P.C. 6.

interest on your overdraft account secured by shares will be increased as from date to $\frac{1}{2}$ per cent over Bank rate minimum $3\frac{1}{2}$ per cent." The circular was not an express proposal as defined in Section 2 (a) because it did not signify to the constituent of the Bank to raise the rate of interest with a view to its obtaining his consent. But though it was a unilateral decision to enhance the rate of interest from the date of the notice, the notice contained an implied proposal to the effect that if the constituent wanted to keep alive his overdraft account with the Bank or desired to take further advances from the Bank it could be done only on the terms contained in the notice. This promise to pay implied proposal invites from him, in the words of Section 8 a "reciprocal interest at the higher rate and as a consideration for that reciprocal promise the Bank offers to desist from making a demand for the immediate payment of the amount advanced and also to make further advances. If the constituent accepts either of these considerations with notice of the fact that the Bank had raised the rates of interest from the date of the notice there would be an implied promise on the part of the constituent to pay interest at that rate.¹

Where an offer is made subject to a condition and that offer is accepted, the person accepting the offer must be presumed to have accepted it with the condition so attached, and he cannot be heard to say that though he accepted the offer, he was not bound by the condition.² ¶

The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at the price to the person making the inquiry. In given circumstances it may be tantamount to an invitation of offers.³ By a clause in a mining lease, the lessee undertook to sell to the Government, out of the ore brought to the surface, such quantity as would be required by the Government after the desire of the latter is notified to him. The undertaking given by the lessee was tantamount only to an offer and did not constitute a subsisting contract.⁴

On the basis of a term in a partition deed that in the event of any one of brothers wishing to sell his share of the house he should sell it to the other brothers at the market value the other brothers can have no right to any specific performance of the undertaking in the partition deed; nor are they entitled to any damages if the sale by one brother to a stranger has not in fact taken place.⁵ ✓

If the party to whom the offer is communicated by a party in Bombay resides or carries on business outside the jurisdiction of the Bombay High Court, the offer cannot be said to have been made within Bombay, and, therefore, no part of cause of action in respect of that transaction can be said to have arisen within the jurisdiction of the High Court at Bombay.⁶

1. *Hulas v. Allahabad Bank*, A.I.R. 1958 Cal. 644.
2. *State of Bihar v. Charanjitlal*, A.I.R. 1960 Patna 139.
3. *McPherson v. Appanna*, A.I.R. 1951 S.C. 184.
4. *Bhaskararao v. V. K. Rao*, A.I.R. 1964 Andhra 77.
5. *Poeran v. Krishna*, A.I.R. 1951 Mad. 396.
6. *Premchand Roychand & Sons v. Moti Lall*, A.I.R. 1951 Bom. 249.

An announcement that a competition will be held is not an offer of the prize to the competitor who obtains the highest marks.¹ An offer of a reward to be paid to any person on his giving certain information to the person advertising the reward is an offer to any person and can be accepted as such in order to constitute a binding contract when the last-mentioned person gives the required information.² Under the English common law it has been insisted that in order to constitute a binding contract in the given cases, the acceptance has to be effected only by a party to whom the offer had been communicated.³ A mere supply of a required information or the performance of specified conditions on the part of anyone will not be tantamount to an acceptance when the person supplying the information or performing the conditions did not do it in the sense of accepting the offer. Contractual obligations do not arise if services are rendered which in fact fulfil the terms of an offer but are performed in ignorance that the offer exists. There cannot be assent without knowledge of the offer and reliance upon it.⁴ Resolutions passed by municipal corporations become contracts when they have been acted upon by employees.⁵

Tenders.—A tender is a proposal. But whether the acceptance of a tender results in a binding agreement will depend upon the whole facts of the case. Where the offeree signifies his definite requirements to be supplied by the proposer and the offeree accepts the tender seeking to meet the requirements in question, the acceptance of the tender on the part of the offeree is an acceptance of the proposal and such an acceptance results in a binding agreement. Where, however, the requirements of the offeree are not definite and deliveries have to be made as and when asked for, the tender made in response to such an invitation to treat is in the eye of the law a standing proposal capable of being split up into separate, severable and distinct contracts resulting from the piecemeal demands being made on the part of the offeree. In such a case the proposer, that is, the party submitting the tender may withdraw his standing proposal at any time it suits him though he is under a binding agreement to supply the goods for which demands have been made on the part of the offeree, that is, the party accepting the tender, provided, again, the demands to be satisfied have been made before the revocation of the standing proposal by the proposer, that is, the party submitting the tender.⁶

1. *Rooke v. Dawson* [1895] 1 Ch. 480.

2. *Maskelyne v. Stollery* (1899) 16 T.L.R. 97; *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 C.A.

3. *Wiles v. Maddison* [1943] 1 All E.R. 315; *Newcomb v. De Roos* (1859) 2 E. & E. 271, 274, 275.

4. *The Crown v. Clarke*, (1927) 40 Commonwealth Law Reports, 227.

5. *Davies v. Rhondda* (1917) 87 L.J. K.B. 166; *Shipton v. Cardiff Corporation* (1917) 87 L.J. K.B. 51; see *Wilson v. Belfast Corporation* (1921) 55 I.L.T. 205.

6. *Percival Ltd. v. L. C. C. Asylums and Mental Deficiency Committee*, (1918) 87 L.J. (K.B.) 677; *Great Northern Railway Co. v. Witham* (1873) L.R. 9 C.P. 16; *Offord v. Davies* (1862) 12 C.B. (N.S.) 748; *Bengal Coal Co. v. Homoe Wadia & Co.* (1900) 24 Bom. 97.

Advertisements inviting tenders for the supply of goods or labour extending over a period of time are not proposals or offers. They are invitations for offers. Tenders, on the other hand, for goods, work, or labour are offers. When accepted, they ripen into contracts.¹ Whether the "acceptance" of a tender is an acceptance in the legal sense so as to produce a binding contract depends upon the language of the original invitation to offer.²

M signed a tender for the supply of petroleum oil to the military authorities in the Lahore Division for the period of one year. The tender read: "...I, . . . hereby agree that on acceptance of this tender or of so much thereof as relates to the supply of any particular class of supplies described therein, I shall, in accordance with such acceptance, supply and deliver at my own expense so much oil of sorts other than kerosene oil, as the Officer I. G. Supplies concerned or Officer I. C. S. R. D. F. Lahore may require, subject to the condition set forth in this tender and in schedule annexed thereto." The schedule to the tender set out the respective prices to be charged on the estimated requirements. The price to be charged was fixed in the schedule at Rs. 3.12.0 per gallon and the estimated requirement stated to be 200 gallons. In a footnote to the schedule appeared the words: "and as required after completion of these quantities". *M* claimed the exclusive right of supplying to the military authorities of Lahore all supplies of petrol ordered for the military department and he sued the military department for damages for having purchased petroleum from persons other than himself. *Held*: that the tender was merely an offer to supply goods at a certain price for the fixed period. So long as the offer remained open *M* was bound to supply the goods at the prices when called upon to do so, up to at least the estimated quantity, and *M* could at any time withdraw his offer upon proper notice to the military authorities and upon such withdrawal his liability to supply the goods not already ordered would have terminated. The military authorities, on the other hand, were not bound to order all the goods from *M*, but, if they did give an order they were bound to pay the price set out in the schedule. They were free to accept the offer or not as they would think fit, and they could buy the goods from any other source without any reference to *M*.³ When a tender has been accepted, it merely creates a series of continuing offers on the part of the party making the tender which the party accepting the tender is at liberty to convert into contracts by giving orders in accordance with the terms of the tender. The person making the tender is under no liability to supply goods until a proper notice for the supply of a definite quantity was given, and his liability could be terminated by his giving the party accepting

1. *Croshaw v. Prutchand and Renwick*, (1899) 16 T.L.R. 45; *Nameirakpam v. Forest Officer, Manipur*, A.I.R. 1962 Manipur 47.

2. *Percival, Ltd., v. L. C. C. Asylums and Mental Deficiency Committee*, (1918) 87 L.J. (K.B.) 677.

3. *Secretary of State v. Madho Ram*, A.I.R. 1929 Lah. 114.

the tender reasonable notice before an order was actually issued.¹ The period of time provided for the submission of a tender is not a period such as is found in the Limitation Act, after which the rights of the parties are extinguished. It is only a measure of convenience and cannot be put on a higher level.²

Auction sales and proposals.—An auctioneer's request for bids is not a proposal in the sense of the Indian Contract Act. The bidder's bid will be treated as the proposal which the auctioneer may accept or not.³ An auctioneer is legally entitled not to hold any sale at all though he may have advertised that certain goods will be sold by auction on a certain day at a particular place.⁴ The bidder's bid being interpreted as the proposal, only the auctioneer's acceptance of a particular bid will ripen the phenomenon into a complete agreement.⁵ Even where the auctioneer advertises that the sale will be without reserve his advertisement to this effect will not be interpreted as a proposal on his part to the highest bidder.⁶ The highest bidder in a public auction, subject to the confirmation by other authorities, gets no vested rights till the sale is confirmed.⁷

Auction Sale and the (Indian) Sale of Goods Act, 1930.—The Sale of Goods Act, 1930, Section 64, lays down that (1) where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale; (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in the customary manner; and until such announcement is made, any bidder may retract his bid; (3) a right to bid may be reserved expressly by or on behalf of the seller and where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf, may, subject to certain provisions, bid at the auction. The said provisions are that where the sale is not notified to be subject to a right to bid on behalf of the seller, it will not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer. The sale may be notified to be subject to a reserved or upset price. If the seller makes use of pretended bidding to raise the price the sale is voidable

1. *Kundan Lal v. Secretary of State*, (1904) 72 P.R. 1904 : 1 P.L.R. 1905.

2. *Chatterji v. Emperor*, A.I.R. 1946 All. 416.

3. See (1789) 3 Term Rep 148. See also the English Sale of Goods Act, 1893, Sec. 58 (2). *Village Panchayat v. Narasayya*, A.I.R. 1965 Andhra 191.

4. *Harris v. Nickerson* (1873) L.R. 8 Q.B. 286.

5. *Premier Insurance Co. Ltd., v. Bharat Commerce and Industries, Ltd.*, A.I.R. 1962 Mys. 185.

6. *Premier Insurance Co. Ltd., v. Bharat Commerce and Industries, Ltd.*, A.I.R. 1962 Mys. 185.

7. See *Fenwick v. MacDonald*, (1904), 6 F. (Ct. of Sess.) 850 (a Scottish case). *Warlow v. Harrison* (1859) 1 E. & E. 309 : 120 E.R. 925. *Johnson v. Boys*, [1899] 2 Ch. 73 ; *Rainbow v. Howkins & Sons*, [1904] 2 K. B. 322.

at the option of the buyer.¹ Until the bidder's bid is finally accepted, it can be withdrawn.²

Duration of proposal.—To have an enforceable contract there must be an offer and an unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration. The fact that there has been a provisional acceptance makes no difference. A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfilment of a condition on which a provisional acceptance is based.

At an auction-sale of liquor shop licences held in accordance with the conditions of sale prescribed by the Board of Revenue the plaintiff's bid was provisionally accepted by the Selling Officer. The final acceptance rested with the Collector under the conditions of sale. The conditions stipulated that no bid which had been provisionally accepted should be withdrawn before it lapsed on a higher bid being accepted or before orders were passed confirming or refusing to confirm it. It was held that the conditions of sale were not settled by the Board of Revenue under any particular provision of the Madras Abkari Act and their publication did not amount to a notification under Section 69 of that Act and had, therefore, no statutory sanction. It was further held that the plaintiff was entitled to withdraw the bid because the prohibition against withdrawal had not the force of law and there was no consideration to bind him down to the condition.³

An offer remains capable of acceptance until the offeree is made aware of its withdrawal.⁴ A proposal may be left open for a period as given on the part of the proposer. The period may be so given by express terms or implications. In the absence of any period thus given, the duration of a given proposal will be gauged by the Court according to the nature and circumstances of the proposal made. Thus, a change of time or circumstances may persuade the Court to conclude as if the proposal had been revoked in the eye of the law, though in fact it had not been so done. A lapse of time may in given circumstances enable the proposer to treat his proposal as withdrawn though he failed to take any positive steps in the matter of withdrawing the proposal.⁵ The death or insanity of the proposer if known to the offeree before acceptance of the proposal has been made by him determines the proposal made.⁶ A proposal, unless made to the public at large,

1. Cf. The English Sale of Land by Auction Act, 1867; *Gilliat v. Gilliat*, (1869) L.R. 9 Eq. 60; The English Sale of Goods Act, 1893, S. 58; The English Auctions (Binding Agreements) Act, 1927.

2. *Union of India v. Narain Singh*, A.I.R. 1953 Punjab 274; *Raghunandan v. State of Hyderabad*, A.I.R. 1963 Andhra 110.

3. *Somasundaram v. Government of Madras*, A.I.R. 1947 Mad. 366.

4. *Henthorn v. Fraser*, [1892] 2 Ch. 27.

5. *Ramsgate Victoria Hotel Co. v. Montefiore* (1866) L.R. 1 Ex. 109; *Loring v. City of Boston* (1844) 7 Metcalf 409.

6. *Dickinson v. Dodds*, (1876) 2 Ch. D. 463, 475, C.A.

assumes the continued existence of a particular offeree. The proposal having been made to a living person, there will be no longer a proposal at all when the given offeree ceases to be a living person before the proposal is accepted.¹ In the case of a proposal relating to his property, bankruptcy of the proposer will determine the proposal.² If the offeree rejects the proposal or accepts it in a qualified manner, the proposal will be deemed to be terminated so far as the said offeree is concerned. For communication, acceptance, and revocation of proposal *see* Sections 3, 4, 5, 6, 7 and 8, *post*.

1 Indian Contract Act and Semantics

Ogden and Richards in their work, *The Meaning of Meaning* use the term 'referent' as a convenient tool for describing the object or situation to which a word label refers. Minds meet and the lines of communication become cleared when the *referent* is found.³ From the point of view of Semantics, the words 'proposal', 'offer', 'acceptance,' and 'promise' have had different referents in different contexts. In the realm of law, it is highly desirable that multiplicity of sense to the same word must not be attributed.⁴ When precision is required, no safer rule can be followed than always to call the same thing by the same name.⁵ But individual words being inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Thus though undesirable, the same word has been used in different senses in the same statute⁶ and even in the same Section.⁷ Coming to the Indian Contract Act, 1872, it will be observed, as it was done by Whitley Stokes,⁸ that the definitions, as given in Section 2, have not been always borne in mind. A 'proposal' when accepted becomes 'promise'.⁹ Every 'promise' is an 'agreement'.¹⁰ All 'agreements' are 'contracts' if enforceable by law.¹¹ Therefore a suit will lie against an 'acceptor' even before his acceptance comes to the knowledge of the proposer which is contrary to the intention of Section 10.¹² If the explanation of reciprocal promises as given in Section 2(h) is substituted in Section 8, the latter Section becomes mean-

1. *Reynolds v. Atherton*, (1921) 125 L.T. 690, 695-6.

2. *Meynell v. Surtees* (1855) 1 Jur. N.S. 737.

3. *Ibid.*, 10th ed., 1949, 5th impression, 1960, pages 9, footnote, 62, 71, 105, and App. B.

4. 'Anekarthatva—akalpana'. See Kishorilal Sarkar : *Mimansa Rules of Interpretation as applied to Hindu Law*, Tagore Law Lectures, 1905, 276.

5. Maxwell : *The Interpretation of Statutes*, 1953, 322 ; *ibid.*, 11th ed., 1962, 311-12.

6. *Whitley v. Stumbles*, [1930] A.C. 544 ; *Carter v. S. U. Carburettor Co.*, [1942] 2 K.B. 288.

7. *Doe v. Angell*, (1846) 9 Q.B. 328 ; 115 E.R. 1299.

8. Whitley Stokes : *Anglo-Indian Codes*, vol. I (1887) : The Indian Contract Act.

9. S. 2 (b).

10. S. 2 (e).

11. S. 2 (h).

12. Whitley Stokes : *Anglo-Indian Codes*, vol. I, (1887), 548.

ingless.¹ Similarly, the expression 'contract', as first occurring in Section 17, has been loosely used, and should be 'agreement'.² This aspect of the Indian Contract Act, 1872, seems to have escaped a scrutiny of the Fifth Indian Law Commission.

Subject to above, the words, 'proposal,' 'offer,' 'acceptance' and 'promise' have been used in the Indian Contract Act each in a defined sense. When the context thus indicates a particular sense of a word, it should be taken in the sense so given to it and not in its popular sense.³ Facts alone will determine whether a particular phrase has been used in a given fact-situation in the sense of the Indian Contract Act. A letter containing a request to borrow a certain sum of money, promising that the same should be repaid with interest on a certain day was construed as a mere proposal under Section 4 of the Indian Contract Act, 1872.⁴ In *Narayansami v. Lokanibalammal*,⁵ too, the same view was taken. A letter requesting the addressee to lend a sum of Rs. 200 to the writer and asking the same to be sent to him through a third person and continuing "I will send these two hundred rupees with interest at Rs. 2-1-4 per cent per mensem, and have it credited in this letter and get it back" was held not to be a promissory note but a mere proposal for a loan and was consequently found admissible in evidence though bearing no stamp.

Section 2(b) : Acceptance of Proposal

Promise.—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. Silence to a letter does not amount to an acceptance of the terms proposed.⁶ A proposal when accepted becomes a promise. A person cannot be bound by a one-sided offer which is never accepted.⁷ The expression 'promise' has been used in the Indian Contract Act in a defined sense. The mere use of the expression 'promise' or its equivalent will not necessarily render a phenomenon a promise in the sense of Section 2(b) of the Contract Act.⁸ According to the definition as per Section 2(b), taken with that of proposal as per Section 2(a), the scope of a promise is confined to the conduct on the part of the promisor. The term 'contract' denotes the

1. Whitley Stokes : *Anglo-Indian Codes*, vol. I, (1887), 550.

2. *Ibid.*, 555; see also S. 2 (h).

3. For the Indian Rules of Interpretation see Kishorilal Sarkar : *Mimamsa Rules of Interpretation as applied to Hindu Law*, Tagore Law Lectures, 1905, 276. 'Phalachamasa maxim'.

4. *Dhondbhat v. Atmaram*, (1889) 13 Bom. 669.

5. 7 Mad. L.J. 220.

6. *Bholat v. Yokohama Specie Bank, Ltd.*, A.I.R. 1941 Rangoon 270 ; *Felthouse v. Bindley*, (1862) 11 C.B. (N.S.) 869 ; 31 L.J. C.P. 204 ; 10 W.R. 423 ; 6 L.T. (N.S.) 157 ; 132 R.R. 784.

7. *Thawardas Phurumal v. Union of India*, A.I.R. 1955 S.C. 468.

8. *Dhondbhat v. Atmaram*, (1889) 13 Bom. 669 ; *Narayanasami v. Lokanibalammal*, (1897) 7 M.L.J. 220. For further discussion, see under S. 2 (a), *ante*.

legal obligation created by the promise. It requires on one side to perform the promise and on the other to accept performance of it.

Where an offer is made subject to a condition and that offer is accepted, the person accepting the offer must be presumed to have accepted it with the condition so attached, and he cannot be heard to say that though he accepted the offer, he was not bound by the condition.¹ Conditional offer rejected by the other party does not amount to a promise within Section 25(3) so as to save limitation.²

A proposal is capable of acceptance only by the person to whom it has been made or by somebody on his behalf. Where the offer was made solely to the real P. G. M. H., a person fraudulently assuming the identity of P. G. M. H. was incapable of accepting it. The fraudulent assumption on the part of a third person prevents the formation of a contract with him. Thus, where a person physically present and negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how the promisee ought to have interpreted the promise. That is to say, where, in negotiations for a contract conducted orally *inter praesentes*, apparent agreement is reached but there is deception as to the identity of a proposed party, the test by which to determine whether there is a contract despite the deception is to answer a question of fact, viz.—whether, contrary to the prima facie presumption that an offer is made to the person to whom it is addressed, the offerer is not contracting with the physical person to whom he utters the offer but with another individual who he believes the person physically present to be.³

When the acceptance of a bid is only conditional or provisional, the bid may be withdrawn before it is finally accepted.⁴ A conditional offer to pay a certain amount made by the management of an industry to the trade union lapses when the condition is not accepted. The question whether there was consideration for the promise made by the management arises only if the offer made had been accepted by the trade union, so as to ripen into an agreement.⁵

An offer remains capable of acceptance until the offeree is made aware of its withdrawal. Where the parties must, from the context, have reasonably assumed that the post might be used as a means of communicating the acceptance of the offer, the acceptance is complete as soon as it is posted.⁶

1. *State of Bihar v. Charanjitlal*, A.I.R. 1960 Patna 139. *Ram Saran v. Shri Kishan*, A.I.R. 1961 All. 91 (principle not correctly applied); *Jawahar Lal v. Union of India*, A.I.R. 1962 S.C. 378.

2. *Shyam Sundar v. Parlakimedi Municipality*, A.I.R. 1964 Orissa 111.

3. *Ingram v. Little*, [1960] 3 W.L.R. 504 C.A. : [1960] 3 All E.R. 332 C.A.; dictum of Viscount Haldane in *Lake v. Simmons*, [1927] A.C. 489, 500 : 43 T.L.R. 417 H.L. *applied*.

4. *Union of India v. Narain Singh*, A.I.R. 1953 Punj. 274 ; *Premier Insurance Co. Ltd., v. Bharat Commerce and Industries, Ltd.*, A.I.R. 1962 Mys. 185.

5. *Pipraich Sugar Mills v. Mazdoor Union*, A.I.R. 1957 S.C. 95.

6. *Henthorn v. Fraser*, [1892] 2 Ch. 27.

Letters may merely set out the terms on which the parties are ready to do business with each other if and when orders were placed and executed. As soon as an order is placed and accepted, a contract arises. Until an order was placed and accepted there was no contract. Each separate order and acceptance constitutes a different and distinct contract.¹

For further discussion on acceptance, see Sections 3, 5, 7 and 8, *post*. For "promisor" and "promisee", see Section 2(c), *infra*. For "reciprocal promises", see Section 2 (f), *infra*. For express and implied promises, see Section 9, *post*.

Section 2(c): Promisor and Promisee

The person making the proposal is called the "promisor". In the eye of the law, the same person cannot be both promisor and promisee in relation to one and the same transaction. There can be no partnership between the same individual acting on the one hand as the guardian of the minor and on the other as a partner in his or her individual capacity.² The party by whom an accepted offer is made is called the promisor, and the party by whom it is accepted is called the promisee. According to the definition as per Section 2(b), taken with that of proposal as per Section 2(a), the scope of a promise is confined to the conduct on the part of the promisor. A promise entails a legal obligation on one side to perform the promise and on the other to accept performance of it. No promise can be inferred unless it is open to the beneficiary either to accept or to reject the benefit of the work.³ In case of sale of goods, if less than the agreed quantity of goods is delivered, and the buyer, instead of exercising his right of rejection, elects to accept them, he must pay for them at the contract rate. Where there is no option there is no right to sue on a *quantum meruit*.⁴ For "reciprocal promises", see Section 2(f), *infra*.

Section 2(d): Consideration

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or promises to abstain from doing something, such act, abstinence or promise is called a consideration for the promise.⁵ Consideration thus involves an element of mutuality between the promisor and the promisee though under the Indian law the consideration may move direct from the promisee or someone else.⁶ It is the sign and symbol of bargain. The Indian Contract Act was not in force when certain surety bonds were executed. The bonds could not be treated as void on ground of want of consideration.⁷

1. *Chatturbhuj v. Parashram*, A.I.R. 1954 S.C. 236; *Rose and Frank Co. v. Cromton and Bros., Ltd.*, [1925] A.C. 445.

2. *Meenakshi v. Subramanian*, A.I.R. 1957 Mad. 8.

3. *Munro v. Butt*, (1858) 8 E. & B. 738.

4. *Sumpter v. Hedges*, [1898] 1 Q.B. 673.

5. *Kanak Sunder v. Ram Laxhan*, A.I.R. 1955 Patna 458.

6. *Husani Bandi v. Gauhar Beham*, (1932) 7 Luck. 292.

7. *Union of India v. Sansar Chand*, A.I.R. 1960 Himachal 1.

On the analysis of Section 2(d), it will appear that under the Indian Contract Act, 'consideration' has had the following characteristics:

(1) 'Consideration' is the (i) doing something, or (ii) abstinence from doing something, or (iii) promise to do something or the promise of abstinence from doing something, on the part of the promisee or some other person.

(2) The said act, abstinence or promise must have been done, undertaken, or given at the desire of the promisor. It is not necessary that the promisor should benefit by the consideration. The act, abstinence, or promise may benefit a third person, but must have moved from the promisee or someone else *because* of the promise as given by the promisor.

(3) The said act, abstinence, or promise may be or may have been done, undertaken, or given either by the promisee, or any other person. It is not necessary, under the Indian law, that the consideration must move from the promisee himself. It may move from any other person.

(4) There must be either an immediate benefit or a promise of benefit to the party promising or a third person or a loss to the person to whom the promise was made or to any other person.

(5) Promises, when reciprocal, may constitute 'consideration', one for the other.¹

✓ **Act done.**—Work or labour, whether mental or manual, and however small in degree is capable of supporting a contract as being valuable consideration.² According to Explanation 2 under Section 25 of the Indian Contract Act, an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given. To cite Halsbury,³ examples of consideration consisting in some right, interest, profit, or benefit accruing to the promisor are: the assignment of a contract, the giving of employment, permitting goods to remain in the promisor's possession, the guarantee of an overdraft, the substitution of one agreement for another, an undertaking to assign, an undertaking to supply goods, the sale of an alleged claim, the increased sale of an advertised article or of a newspaper, the deposit of a store warrant with a bank, an agreement to supply electric light at a fixed rate, an agreement to accept reduced salary during war time, the previous rate to be restored at the termination of war, an agreement that a product warranted by a party should be used by the other party's contractors.

✓ **Abstinence undertaken.**—Examples of consideration consisting in some

1. *Wichals v. Johns* (1599) Cro. Eliz. 703.

2. Halsbury's Laws of England, 3rd. edn., vol. 8, para. 100.

3. *Ibid.*, para. 199.

forbearance, detriment, loss, or responsibility suffered or undertaken by the promisee are :¹ the surrender of a security, of a right to charge item charges by a solicitor, of an interest in a business, of a claim to assignment of a lease, the withdrawal of opposition to a sale, entering into an engagement, the submission of accounts to inspection, going to a particular place, the regular use of an advertised article, the payment of money, or of a high rate of interest, an undertaking to pay money, the submission to the risk of having to pay money, a promise to render future services, enlistment in the army, remaining unmarried, the giving of confidential information for a particular purpose, the waving of interest on a loan as an inducement to a company to carry on business, giving up a right to prove in bankruptcy, the paying by the payee of a cheque into his account and drawing by him of cheques against it at the request of the drawer. Forbearance to sue, even though no definite time is allowed, is a valuable consideration for a promise, provided that the promisee has reasonable ground for believing that he has a good cause of action. Forbearance to sue a third person at the request of the promisor is a sufficient consideration for his promise. Forbearance for a stated time, forbearance to press for immediate payment, forbearance by mother of illegitimate children from affiliation proceedings, forbearance to sue for doubtful claim, forbearance by bank to enforce existing debt on promise to give security, refraining from withdrawing balance of trust account from bank, and promise by bank to give security are good considerations.² Forbearance to sue for ejectment is a good consideration for an agreement to pay enhanced rent.³ Compromise of a doubtful right is enough basis for an agreement.⁴

Promise to do or promise to abstain from doing.—A debtor gave a creditor a post-dated cheque for the amount of a prior advance secured by the promissory note, the creditor agreeing not to claim on the note during the currency of the cheque. The creditor could sue on the cheque on the ground that although only a collateral security and not discharging the debtor's liability on the note, the agreement not to claim under the note was consideration for the cheque.⁵ Where goods have been paid for by a negotiable instrument which is still running there is valuable consideration for a subsequent agreement that the negotiable instrument shall be paid out of moneys arising from the sale of the goods.⁶ The promise, to party to existing contract to marry, of an annuity in consideration of such marriage is enforceable.⁷ In a contract by shipowner to deliver cargo to order of third party, delivery was ordered to defendant. The promise by defendant

1. Halsbury's Laws of England, 3rd. edn., vol. 8, para. 199; *Kanak Sunder v. Ram Lakhan*, A.I.R. 1955 Patna 458.

2. Halsbury's Laws of England, 3rd. edn., vol. 8, para. 209.

3. *Lakshmi Chand v. Niader Lal*, A.I.R. 1961 All. 295.

4. *Hurihar Prasad v. Kesho Prasad*, A.I.R. 1925 Patna 68.

5. *Elkington v. Crooke-Hill*, (1914) 30 T.L.R. 670.

6. *Walker v. Rostron*, (1842), 9 M & W. 411.

7. *Shadwell v. Shadwell*, (1860) 9 C.B.N.S. 159.

to discharge cargo at a given rate is enforceable.¹ A promise to perform a duty whose existence is a matter of uncertainty at the time of the agreement is a valid consideration.²

[[A wife started proceedings for divorce and obtained a decree *nisi* against her husband. The husband then promised to allow her £100 per annum free of tax as permanent maintenance. The wife did not in fact apply to the Divorce Court for maintenance, but this forbearance was not at the husband's request. The decree was made absolute. The annual payments were never made and ultimately the wife sued the husband on his promise to make them. The Court gave judgment for the wife, though it was found that there was no consideration for the husband's promise. But to allow a plaintiff to sue upon such a promise was to ignore the necessity of consideration. The Court of Appeal therefore reversed the decision. It was observed that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him; but he must accept their legal relations subject to the qualifications which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word. The promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it.³ A promise by one party to a contract to suspend his legal rights under it, though unsupported by consideration, raises an equitable estoppel and may be used by the other party by way of defence, provided that the latter has acted in reliance upon the promise and has thereby altered his position. This promise will continue to operate so as to suspend the legal rights of the promisor unless and until reasonable notice has been given by the promisor that he proposes to resume those rights. What amounts to reasonable notice is a question of fact dependent upon the circumstances of each case.⁴ For further discussion on this, see under *Promise as estoppel*, *infra*. See also *Promissory estoppel*, under Section 63, *post*. See *business and a*

At the desire of the promisor.⁵ The consideration must move from the promisee or someone else at the desire of the promisor. It is not necessary that the promisor should benefit by the consideration. Even a third person may benefit from it. A promises to pay B Rs. 10,000 if the latter writes a book for him. When the book is so written, that is when the consideration has been given by B, he can enforce the payment of Rs. 10,000. In a joint agreement between C, D, E and F, C promises to pay Rs. 10,000 to D when E writes a

1. *Scotson v. Pegg*, (1861), 6 H. & N. 295 : 158 E.R. 121.

2. *Williams v. O'Keefe*, [1910] A.C. 186 P.C. See Halsbury's Laws of England, 3rd. edn., vol. 8, page 117.

3. *Combe v. Combe* [1951] 2 K.B. 215 : [1951] 1 All E.R. 767.

4. See Cheshire and Fifoot : *Law of Contract*, 6th ed., 1964, 85.

5. *P. R. S. Pillai v. M. Sathyanesan* A.I.R. 1965 Ker. 155.

book for *F*. When *E* who is not the promisee has given the consideration and thus benefits *F* who is a person other than the promisor, *D* can enforce the payment because the consideration was given at the desire of the promisor *C*. It is not necessary that the promisee should benefit by the consideration. It is sufficient if the promisee or someone else does some act from which a third person benefits, and which the promisee or that someone else would not have done but for the promise. S, S

✓ **The promisee or other person.**—The consideration whether it is an act, forbearance, or promise may be given, under the Indian Contract Act, either by the promisee himself or anyone else for the promise made on the part of the promisor. ¶ *A* and *B* make an agreement whereby *A* promises to write a book for *B*, and *B* promises in return to pay *A* Rs. 10,000. When *A* has written the book he has given the consideration and can sue *B* for Rs. 10,000. By a joint agreement between *C*, *D* and *E*, *C* promises *D* and *E* to pay *E* Rs. 1,00,000 if *D* will carry but a work as desired by *C*. When the work is so carried out by *D*, *E* will enforce the payment of Rs. 1,00,000 though the consideration has been given by *D* who is a person other than the promisee. It is sufficient that *D* carried out the work at the desire of *C*. S, S

✓ **Executed consideration and executory consideration.**—Consideration is either executed or executory. It is executed when the promise is made in return for the performance of an act. An executed consideration thus consists in some act or abstinence on the part of the promisee completed at the time when the promisor gives his promise. An executed consideration may thus be a consideration already performed before the making of the defendant's promise. If this past or executed consideration was furnished upon an express or implied request by the promisor from which a promise to pay or perform the promise would be implied, the contract will be upheld. Otherwise, an executed consideration will not, ordinarily, support a promise.

R offers, by way of reward a necklace of a given weight and quality to anyone who shall inform him of the whereabouts of *S* who is not traceable. The necessary information given to *R*, with the knowledge of the offer, by *H* is the acceptance of the proposal as made by *R* as well as the executed consideration moving from *H*. The consideration moving from *H* in the instant case is called executed in the sense that it has been completed before the corresponding promise on the part of *R* has been performed. This is not a case of past consideration. Here executed means completed or performed.

An executed consideration consists of an act for a promise. It is the act which forms the consideration. No contract is formed unless and until the act is performed, e. g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise without further consideration is merely a *nudum pactum*. ✓ In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration. In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the

other. The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other. There is nothing to prevent one of the parties from carrying out his promise at once, i. e., the performing his part of the contract whereas the other party who provides the consideration for act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party.¹

A consideration is executory when the promisor gives the promise in return for a counter-promise from the promisee. An executory consideration thus consists in a promise on the part of the promisee to do or abstain from doing some act in the future. Here something is to be done after the promise. *A* makes an agreement with *B* for the sale of goods for future delivery on credit. The consideration is an executory one. An advantage to be gained by a section of the Government's subjects was an executory consideration.²

It will appear from the above that consideration has been divided into executed and executory on the basis of the time when the consideration comes into operation. On this basis, again, the considerations in the case of mutual promises may be called concurrent. A consideration may be called continuing, say, in a case where it has been executed in part only. The term executed consideration sometimes is used to mean past consideration pure and simple, for which *see* below. Where the consideration is executory, concurrent or continuing it is sufficient to support a contract which is not void for other reasons.

Past consideration.—Under the English Common Law a promise based upon a *past* consideration is not enforceable. A past consideration in the eye of the English Common Law is no consideration.³ An executed consideration, as we have seen, is a good consideration. It is distinguished from a past consideration in that an executed consideration is satisfied at the request of the defendant and not voluntarily.⁴ It is this earlier request of the defendant which makes the executed consideration a consideration in the eye of the law, that is, a consideration which, apart from the cases of exception, is a *sine qua non* for the enforceability of the contract concerned at the instance of the party from whom the executed consideration had moved. Where past services were rendered on the implication that they were to be paid for, and subsequently a promise has been made to pay for the said services as rendered, such a promise will be presumed in law as to have been on an executed consideration and therefore enforceable.⁵

1. *Union of India v. Chaman Lal* A.I.R. 1957 S C. 652.

2. *Bombay Municipal Corporation v. Secretary of State* (1934) 58 Bom. 660.

3. *Roscorla v. Thomas* (1842) 3 Q.B. 234; *Re McArdle* [1951] 1 Ch. 669; [1951] 1 All E.R. 905.

4. *Lampleigh v. Brathwait* (1605) Hob. 105.

5. *Re Caseys' Patents. Stewart v. Casey* [1892] 1 Ch. 104.

In India, too, an agreement without consideration is void except in exceptional cases. For these exceptional cases *see* under Section 25, *post*. Cases of past consideration are treated in law as cases without consideration, though this general rule is, again, subject to the exceptions as laid down under Section 25, *post*.

As to presumptions of consideration as to negotiable instruments, *see* Section 118 of the Negotiable Instruments Act, 1881.

Promise as estoppel.—Where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him; but he must accept their legal relations subject to the qualification which he himself has so introduced even though it is not supported in point of law by any consideration but only by his word. That is to say, when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it.¹ A promise not backed with a sufficient consideration though not enforceable at the instance of the promisee is thus not always without any legal significance. Such a promise, as we have seen, sometimes operates as an equitable estoppel as against the promisor. When, for example, the promisor by his conduct has led the promisee to alter his position in pursuance of the promise made, the promisor will be estopped in his withdrawing the promise so made. When a party to a contract has promised to suspend his legal rights thereunder though for no consideration moving from the other side and the other side has acted on the basis of such promise and has thereby altered his position, the promisee may avail himself of the promise as made, by way of defence. The promisor, again, can withdraw his promise with due notice to the other party and can thus save himself from the estoppel. What is a due notice for the purpose in question will, again, depend on the circumstances of the case concerned.² When parties have entered into definite and distinct terms involving legal results and afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the party who otherwise might have enforced those rights will not be allowed in law to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties. This doctrine of estoppel has been held applicable

1. *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360 (*per* Lord Selborne). *See* also below.

2. *Combe v. Combe* [1951] 2 K. B. 215; [1951] 1 All E.R. 767; *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; *Foakes v. Beer* (1884), 9 App. Cas. 605.

both in cases of a promise of present or future conduct and in cases of statements of fact. This express or implied notice of suspension is, again, capable of being withdrawn by a reasonable notice, whether express or implied, to resume the rights that were kept in suspense or held in abeyance.¹

Estoppel.²—‘Estoppel’ means a conclusive admission, which cannot be denied. “‘Estoppel’, commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man’s owne act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.” Estoppel is of three kinds, i. e., matter (1) of record, (2) in writing, i. e. *semble*, by deed, (3) *in pais*.

It is of “vast” importance in the doctrine of estoppel that a person seeking to set it up must show that he was induced to change his position on the faith of it.³ He must also show that he was misled by the person against whom he claims the estoppel, that such person had a duty towards him not to mislead, and that such misleading was the real proximate cause of his loss.⁴

The three kinds of estoppel in England are:—

(1) By matter of record, which imports such absolute and incontrovertible verity, that no person against whom it is producible shall be permitted to aver against it. A record concludes the parties thereto, and their privies, whether in blood, in law, or by estate, upon the point adjudged, but not upon any matter collateral or adjudged by inference.⁵

(2) By deed. No person can be allowed to dispute his own solemn deed, which is therefore conclusive against him, and those claiming under him, even as to the facts recited in it. The general rule is that an indenture estops all who are parties to it, while a deed-poll only estops the party who executes it, since it is his sole language and act.

(3) In pais, i. e., by conduct or representation as that a tenant cannot dispute his landlord’s title. A false representation to create an estoppel must be a representation of an existing fact and must be acted on before it is corrected. A company is estopped by its certificate as against anyone who purchased on the faith of it.

The English conception of equitable estoppel does not essentially differ

1. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 657; *Salisbury v. Gilmore* [1942] 2 K.B. 38; [1942] 1 All E.R. 457; *Panontsos v. Raymond Hadley Corporation of New York* [1917] 2 K.B. 473; *Birmingham and District Land Co v. L. & N.W. Ry.* (1888) 40 Ch. D. 268; *Hughes v. Metropolitan Railway Co.* (1887) 2 App. Cas. 439, 448; see also *Cheshire and Fifoot: Law of Contract*, 6th ed., 1964, 85-86.

2. Stroud: *Judicial Dictionary*, 3d ed., 1952, vol. 2, 995; Wharton: *Law Lexicon*, 14th ed., 1957, 381. Co. Litt. 352. a (*Hargrave & Butler*, ed., vol. 2) 1832.

3. *Bell v. Marsh* [1903] Ch. 543.

4. *Longman v. Bath Electric Tramway* [1905] 1 Ch. 646; *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (1938) Mad. 360 P.C.; *People’s Insurance Co. Ltd. v. Sardul Singh* A.I.R. 1962 Punj. 543.

5. As to estoppel by record, and issue estoppel. see *Fideliats Shipping Co., Ltd., v. V. Export Chleb*, [1965] 1 All E.R. 4.

from the conception of estoppel at common law in England,¹ though in equity it has had a larger field of operation.

The doctrine of equitable or quasi-estoppel in action.—To quote Cheshire and Fifoot, *Law of Contract*, 6th ed., 1964, page 86, the doctrine of equitable or quasi-estoppel may be expressed in the following propositions :

(1) If a promise is given by one party to a contract not to insist upon his rights under that contract and there is no consideration for the promise, the promisee cannot sue upon it.

(2) If the promisor breaks his promise and sues on the original contract, the promisee may use the promise by way of defence.

(3) To succeed in this defence the promisee must satisfy the Court that it is inequitable to allow the promisor to sue on the original contract; and this he will normally be able to do if he has acted in reliance upon the promise.²

(4) If the promise was intended only to suspend and not to abrogate the legal rights of the promisor, the promise will continue to operate until reasonable notice has been given by the promisor that he proposes to resume those rights.

Estoppel by conduct or representation.—The essential factors giving rise to an estoppel are :

(a) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made.

(b) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made.

(c) Detriment to such person as a consequence of the act or omission where silence cannot amount to a representation, but, where there is a duty to disclose, deliberate silence may become significant and amount to a representation. The existence of a duty on the part of a customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question was rightly admitted.³

Whenever a question has in substance been decided, or has in substance formed the *ratio* of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question hereafter.⁴

Estoppel is a complex legal notion, involving a combination of several essential elements—statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly

1. *Canadian Pacific Ry. Co. v. The King* [1931] A.C. 414, 429 P. C.; *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360.

2. *P. v. P.* [1957] N.Z.L.R. 854 (Supreme Court; *per* McGregor, J.).

3. *Greenwood v. Martins Bank* [1933] A.C. 51.

4. *New Brunswick Rail Co. v. British and French Trust Corporation*, [1939] A.C. 1.

viewed as a substantive rule of law.... Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. But the whole case of estoppel fails if the statement is not sufficiently clear and unqualified.¹

Chapter VIII of the Indian Evidence Act, 1872, deals with the law of estoppel in India.

When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. *A* intentionally and falsely leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it. The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.²

No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.³

No acceptor of a bill of exchange shall be permitted to deny that drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence. The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn. If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.⁴

A party cannot set up an estoppel in face of a statute.⁵ There can be no estoppel against the law of the land whether it is statutory, personal or common law. Parties are not allowed to contract out of the law of the land. In the interest of the public revenue, provisions have sometimes been made impliedly barring the application of the doctrine of estoppel in some cases. The Sea Customs Act, 1878, furnishes an illustration. Section 39 of the Act lays down that the Customs authorities are not estopped by their

1. *Canada & Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.* [1946] 3 W.W.R. 759.

2. S. 115, *ibid.*

3. S. 116, *ibid.*

4. S. 117, *ibid.*

5. *Kok Hoong v. Leong Cheong Mines. Ltd.* [1964] 1 All E. R. 300 P. C.

own assessment, short-levy or non-assessment of duty. Thus, when customs-duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis-statement as to real value, quantity or description on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded, the person chargeable with the duty or charge which has not been levied or which has been short-levied, or to whom such refund has erroneously been made, shall pay the duty or charge or the deficiency or repay the amount paid to him in excess, on a notice of demand having issued to him within three months from the relevant date as defined in sub-section (2) of the Section.

To maintain estoppel it is essential to show neglect of a duty which a person owes to the public or to an individual.¹ By applying the doctrine of estoppel the Court applies the public policy of the law in order to do justice.² Estoppel is a rule of evidence which in certain circumstances precludes a person from establishing real facts.³

The knowledge on the part of the defendant that the plaintiff was carrying out the provisions of the mortgage-deeds that were not binding upon the defendant and his allowing the plaintiff to do so did not estop him from disputing them afterwards, for it was no part of his duty to step in and protect the plaintiff against the consequences of his own unauthorised dealings with his property.⁴ Where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control. Where the plaintiff might and ought to have urged the question of fraud in the former litigation, but did not so urge, he was estopped from raising the question of fraud in the subsequent litigation. A decree fraudulently obtained may be challenged by a third party who stands to suffer by it either in the same or in any other Court; but as between the parties themselves to a collusive decree, neither of them can escape its consequences.⁵ When an illegal purpose has been effected by a transfer of property, the transferee is not to be treated as a trustee holding it for the benefit of the transferor.⁶ The doctrine of estoppel does not preclude a party to a bigamous ceremony of marriage from alleging it to be null and void even though he had previously asserted its validity in judicial proceedings.⁷ How far the act of the registered owner of shares estops him from asserting his title against a third party must depend on the particular facts of each case.⁸

1. *Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.* (1938) Mad. 360 P.C.

2. *Raghavalu v. Adinarayana* (1909) 32 Mad. 323.

3. *Meherally v. Sakerkhanoobai* (1905) 7 Bom. L.R. 602.

4. *Shiddheshwar v. Ramchandra* (1882) 6 Bom. 463.

5. *Chenvirappa v. Puttappa* (1887) 11 Bom. 708.

6. *Chenvirappa v. Puttappa* (1887) 11 Bom. 708; *Sidlingappa v. Hirasa* (1907) 31 Bom. 405.

7. *Hayward v. Hayward* [1961] 2 W.L.R. 993.

8. *Abdul Vahed v. Hasanalli* (1926) 50 Bom. 229.

Delivery of the share certificates with the transfers executed in blank passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered owner.¹

In order to prevent a person who has been a party to a fraudulent transaction from pleading his own fraud, the intended fraud must have been effected, or there must have been a substantial part of performance of the intention to defraud. The mere fraudulent intention evidenced by the transaction is not sufficient.² Where the purpose of the fraud has not been effected, there is nothing to prevent the plaintiff from repudiating a *benami* transaction as being *benami* and recovering possession of the property.³ Fraud having been effected the real owner will be estopped from pleading fraud.⁴ Even partial carrying out of a fraud debars recovery.⁵ The legal representatives of the fraudulent transferor are also estopped.⁶ Where the intention to commit fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him is *benami*.⁷ In *Qadir Bakhsh v. Hakam*, (1932) 13 Lah. 713, a full bench decision, it was held that if in a suit by the ostensible mortgagee for possession the defendant claimed to be the real beneficiary under the mortgage transaction there was no bar to the defendant pleading the joint fraud of himself and the plaintiff and by proving the true facts, to defeat the latter's claim. Conveyance to defraud creditors, cannot be impeached if creditors have been defrauded or if conveyance has been held valid by a decree though collusively obtained.⁸

In *Venkata v. Aiyanna*, (1917) 40 Mad. 561, a full bench decision, it was held that a tenant who had executed a lease but had not been let into possession by the lessor was estopped from denying his lessor's title in the absence of proof that he had executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease had been procured by fraud, misrepresentation or coercion.

A stipulation in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract, is not a stipulation in restraint of trade under Section 27.⁹

1. *Fazal v. Mangaldas* (1922) 46 Bom. 489.

2. *Venkataramayya v. Pullayya* (F.B.) (1936) 59 Mad. 998.

3. *Petherpermal v. Munandi* (1908) 35 Cal. 551 P.C. : 35 I.A. 98.

4. *Sidlingappa v. Hirasa* (1907) 31 Bom. 405; *Kotayya v. Mahalakshamma* (1933) 56 Mad. 646.

5. *Muthuraman v. Krishna* (1906) 29 Mad. 72.

6. *Rangamma v. Venkataravi* (1895) 18 Mad. 378; *Rangammal v. Venktachari* (1897) 20 Mad. 323; *Tarmati v. Chundru* (1897) 20 Mad., 326.

7. *Jadu Nath v. Rup Lal* (1906) 33 Cal. 967.

8. *Kondeti Kama v. Nukamma* (1908) 31 Mad. 485.

9. *Carlises Nephews & Co. v. Ricknath Bucktear Mull* (1882) 8 Cal. 809.

Persons mentioned in Section 11 of the Contract Act as incompetent to contract are not included in the "persons" of whom Section 115 of the Evidence Act speaks.¹

Estoppel cannot operate to hinder or prevent the exercise by an authority of their statutory discretion where the discretion was intended to be exercised for the benefit of the public or a section thereof. There is no logical distinction quoad estoppel between the prevention or hindrance of a positive statutory duty and the prevention or hindrance of the exercise of a statutory discretion.²

A question of liability to tax for one year is to be treated as inherently a different issue from that of liability for another year—as not *eadem quaestio*—even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of *res judicata* did not apply. It is not the status of the tribunal itself, judicial or administrative, that forms the determining element for estoppel in cases of this kind but the limited nature of the question that was within the tribunal's jurisdiction.³ *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155: 42 T.L.R. 207 P.C., could not be treated as an authority on the question of estoppels in respect of successive years of tax assessment.⁴

A decision of a local valuation court did not create an estoppel *per rem judicatum* when the valuation list which was the subject of the decision had come to the end of its statutory life and a new quinquennial valuation list had to be brought into existence, even when it was shown or agreed that there had been no change of circumstances. The jurisdiction of the tribunal was limited in that its function began and ended with deciding for a terminable period. Further, the position of a valuation officer was that of a neutral official charged with the recurring duty of bringing into existence a valuation list, and could not properly be described as a party so as to make the proceedings *a lis inter partes*.⁵

As to distinction between *estoppel* and *waiver* see *Dawsons Bank, Ltd. v. Japan Cotton Trading Co., Ltd.* (1935) 13 Rang. 256 P. C.⁶ See below.

1. *Gokuldas v. Gulab Rao* A.I.R. 1926 Nag. 108.

2. *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, [1961] 2 W.L.R. 806; *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610: 53 T.L.R. 391: [1937] 1 All E.R. 748 P.C. applied.

3. *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council* [1926] A.C. 94 P.C. applied.

4. *Caffoon v. Income Tax Commissioner, Colombo* (a case from Ceylon), [1961] 2 W.L.R. 794 P.C.

5. *Society of Medical Officers of Health v. Hope*, [1960] 2 W.L.R. 404 H.L.; *Leith Harbour and Docks Commissioner v. Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17 H.L. applied.

6. Also cited, *Dawson's Bank, Limited v. Nippon Menkwa Kabushiki Kaisha* (1934) 62 I.A. 100; *Dawsons Bank, Ltd. v. Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Co. Ltd.)* A.I.R. 1935 P.C. 79; and *Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Company Ltd.) v. Dawsons Bank, Ltd.* (1935) 51 Ll. L.R. 147 P.C.

In *Dawsons Bank, Limited v. Japan Cotton Trading Co., Ltd.* (on appeal from the High Court at Rangoon), (1934-35) 62 I. A. 100: (1935) 13 Rang. 256 P. C.: A. I. R. 1935 P. C. 79: (1935) 51 Ll. L. R. 147, the letters "O. K." as used in the delivery order amounted merely to a statement that the seller had at the mill the specified rice, and were not a representation that it was free from incumbrances; further, the representation as pleaded and as stated by the High Court at Rangoon, was not of an existing fact as required by Section 115 of the Indian Evidence Act, 1872; moreover, the evidence did not establish that the respondents in paying the seller had relied upon the alleged representation. Hence the appellants, namely, Dawsons Bank, Limited, were not estopped.

Further cases of estoppel.—Lord Russel of Killowen in *Dawsons Bank, Ltd. v. Nippon Menkwa Kabushiki Kaisha (Japan Cotton Trading Company Ltd.)*¹ observed: "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or (to put in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement. On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver." In the words of Langton, J., thus there are three conditions necessary to bring a rule of estoppel into play.² See also *Ajayi v. R. T. Briscoe (Nig.) Ltd.*, [1964] 1 W.L.R. 1326 P.C., for *promissory estoppel*, under Section 63, *post*.

A person who makes a statement with the intention that it should be acted upon and which is acted upon is estopped from contesting its truth although it was not fraudulently made. No statement can however operate as an estoppel unless it is precise and unambiguous.³ Subject to this, it can be said that if a person makes a false representation to another and that other acts upon that false representation the person who has made it

It will be noted that none of these citations appears to be accurate. (1935) 51 Lloyd's List Law Reports appears to have shown the respondents as appellants in its citation; the A.I.R. 1935 P.C. seems to have mis-spelt the name of the respondents; and the I.L.R. (1935) 13 Rangoon seems to have dropped the Japanese name of the respondents. [1935] A.C. does not report the case in question. (1934-35) 62 I.A. 100 adds one apostrophe after *Dawson*.

1. On appeal from the High Court at Rangoon.

2. *Square v. Square. Cowan v. Cowan*, [1935] P. 120, 126.

3. *Low v. Bouwerie*, [1891] 3 Ch. 82; *Burrowes v. Lock*, (1805) 10 Ves. 470.

shall not afterwards be allowed to set up that what he said was false and to assert the real truth in place of the falsehood which has so misled the other.¹

Estoppel is not a cause of action ; it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself.² Estoppel not being itself a cause of action, the party acting on the basis of the misrepresentation has to find out an independent cause of action in order to avail himself of the doctrine of estoppel.

Where a person has been misled as the result of the representation made by another, the latter cannot be asked to make good his representation by doing a thing which would ultimately lead to a situation which would justify the representation made. He can however be called upon on an independent cause of action to pay damages in order to compensate the party misled for the loss to which he has been put by reason of his misrepresentation.³ In the absence of fraud, an action of deceit would not lie.⁴

The rule as to estoppel is applicable whether the innocent misrepresentation was made by a party to the contract or by a stranger.⁵ There can be no estoppel where the truth of the matter is known to both parties. A false representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.⁶ A mortgagor employing an attorney who also acted for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney, and therefore where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon an inquiry as to it, *held* that the mortgagor was not entitled to compensation under Sections 38 and 41 of the Specific Relief Act, 1877.⁷ Now *see* Sections 30 and 33 of the Specific Relief Act, 1963.

The doctrine of estoppel operates where *A* has by his words or conduct induced *B* to act in a way in which he would not otherwise have acted,⁸ but in the circumstances any reasonable man would have acted in the same way.⁹ A man must abide by his words or conduct.¹⁰

In *Hughes v. Metropolitan Railway Co.*, (1877) 2 App. Cas. 439 H.L.(E.), the company was entitled in equity to be relieved against the forfeiture because the letters at the end of November and the beginning of December had the

1. *Balkis Consolidated Co. v. Tomkinson* [1893] A.C. 396, 410; *Jorden v. Money* (1854), 5 H.L. Cas. 185, 210, 212.

2. *Low v. Bouverie*, [1891] 3 Ch. 82, 101; *Seton v. Lefons*, (1887), 19 Q.B.D. 68, 70.

3. *Balkis Consolidated Co. v. Tomkinson*, [1893] A.C. 396, 410; *Burrowes v. Lock*, (1803) 10 Ves. 470.

4. *Le Lievre v. Gould*, [1893] 1 Q.B. 491.

5. *Oades v. Spafford*, [1948] 2 K.B. 74; [1948] 1 All E.R. 607.

6. *Mohori Bibee v. Dharmodas Ghose* (1903) 30 Cal. 539 P.C.

7. *Brohmo Dutt v. Dharmo Das* (1899) 26 Cal. 381.

8. *Pickard v. Sears* (1837) 6 A. & E. 469; *Mews' Digest* viii, 747.

9. *Freeman v. Cooke* (1848) 2 Ex. 654; *Mews' Digest* iii, 232, etc.; viii, 715, etc.; ix, 1056.

10. *People's Insurance Co. Ltd. v. Sardul Singh* A.I.R. 1962 Punj. 543.

effect of suspending the notice and the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair.

In *Birmingham and District Land Co. v. London and North Western Ry. Co.*, (1889) 40 Ch. D. 268, C.A., the doctrine of estoppel operated not against the original contracting party, but against a third party who must take the land *cum onere* just as a restrictive covenant. The railway company took the land subject to the same equity which would have prevented the landlord from ejecting *A* until *A* had had a reasonable time to complete the building.

In *W. P. Jorden v. J.W. Bayley Money*, (1854) 5 H.L.C. 185; 10 E.R. 868, it has been held that statements of intention have been excluded from raising an equitable estoppel. Equity will restrain a person from enforcing a legal right on the strength of the words indicating an existing state of fact and not on the words indicating a mere intention.¹

St. Leonards observed: "It is immaterial whether there is a misrepresentation of a fact as it actually existed, or a misrepresentation of an intention to do or abstain from doing an act which would lead to the damage of the party whom you thereby induced to deal in marriage, or in purchase, or in anything of that sort, on the faith of that representation."

Lord Brougham on the other hand was of the view that to raise an equity there must be representation of existing facts, and not of mere intention. Lord St. Leonards was *dissentiente*. Lord Chancellor Lord Cranworth agreed with Lord Brougham.

For a support of the dissenting view of Lord St. Leonards (page 248 of 5 H.L.C. 185; 10 E.R. 895) see Hanbury, *Modern Equity*, 8th ed., 1962, pages 96-98.

In *Kelsen v. Imperial Tobacco Co.*, [1957] 2 Q.B. 334, an advertising sign erected by the defendants projected into the air space above the plaintiff's single-storey shop. The invasion of the plaintiff's air space was a trespass and not a mere nuisance. A mandatory injunction was granted.

Tool Metal Manufacturing Co. v. Tungsten Electric Co., [1954] 1 W.L.R. 862; [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, is a case referring to the point that inducement may lose its effect. See *per* Viscount Simonds.

Under the doctrine of equitable estoppel, a promise unsupported by consideration cannot form a cause of action itself. See *Combe v. Combe*, [1951] 1 All E.R. 767 C.A.; *Beesley v. Hallwood Estates Ltd.*, [1960] 1 W.L.R. 549, reversed on another ground [1961] Ch. 105 C.A.; and *Foakes v. Beer*, (1884) 9 App. Cas. 605 H.L.(E.). As to this last-mentioned case, see Hanbury, *Modern Equity*, 8th Ed., 1962, 100; see also *Hughes v. Metropolitan Railway Co.*, (1877) 2 App. Cas. 439. H.L.(E.). See also the English Law Reform Committee, Sixth Interim Report, recommending the abandonment of the rule

1. *Jorden v. Money* (1854) 5 H.L.C. 185, (*per* Lord Brougham) at page 224.

that the promise of payment of a smaller sum cannot be a discharge for a larger debt.¹

In *Howell v. Falmouth Boat Construction Co. Ltd.*, [1961] A.C. 837, 845 H.L.(E.), (see *per* Lord Simonds) it was held that the fact that a government officer in his dealings with the subject might have assumed an authority, which he had not possessed, to grant a licence did not debar the crown from enforcing a statutory prohibition or entitle the subject to maintain that there had been no breach of it. Lord Simonds criticised Lord Denning in *Robberson v. Minister of Pensions*, [1949] 1 K.B. 227, by observing: "I know of no such principle in our law nor was any authority for it cited."² In *Commissioners of Crown Lands v. Page*, [1960] 2 Q.B. 274 C.A., it was observed that since the entry in question was by the Crown in the proper exercise of its executive authority, it did not amount to an eviction, and rent, accordingly, continued to be payable.

In *Commissioners of Crown Lands v. Page*, [1960] 2. Q.B. 264, 284, 287, 289 C.A., the Minister of Works, in 1945, acting on behalf of the Crown and in exercise of powers conferred by the Defence (General) Regulations, 1939, requisitioned premises which had been demised in 1937 by the Commissioners of Crown Lands for a term of 25 years. The premises were derequisitioned on September 3, 1955. The lessee paid no rent from April 5, 1945, until July 5, 1955, and the landlords brought proceedings claiming arrears of rent. The lessee alleged that she had been "evicted" by the requisitioning and that, accordingly, payment of rent had been suspended. It was conceded that the Crown was one and indivisible as lessor and requisitioning authority. *Held*, that since the entry was by the Crown in the proper exercise of its executive authority, it did not amount to an eviction, and rent, accordingly, continued to be payable. Lord Evershed, M. R., and Ormerod, L. J., observed that the limited intention of the Crown to deprive the lessee of her enjoyment was not consistent with the intention requisite to an eviction. There was no express covenant for quiet enjoyment, and such a covenant could not be implied so as to limit the Crown's proper future exercise of its powers and duties under statute. Devlin, L. J., at p. 292, observed that even if there was such an express covenant it must by necessary implication be read to exclude those measures affecting the nation as a whole which the Crown took for the public good.

In *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227, (Denning J.) the appellant, a serving army officer, wrote to the War Office regarding a disability of his and received a reply, dated April 8, 1941, stating: "Your disability has been accepted as attributable to military service." Relying on that assurance he forbore to obtain an independent medical opinion on his own behalf. The Minister of Pensions later decided that the appellant's disabili-

1. *Central London Property Trust v. High Trees House* [1947] 2 K.B. 130; *Foot Clinics (1943) v. Cooper's Gowns* [1947] K.B. 506.

2. See also *Falmouth Boat Construction Co. Ltd. v. Howell* [1960] 2 K.B. 16, 26 C. A., at page 26 *per* Denning, L. J.

lity was not attributable to war service. Denning, J., held that the assurance was binding on the Minister of Pensions and the applicant became entitled to assume that the War Office had consulted any other departments concerned before it gave the assurance.

In *Square v. Square. Cowan v. Cowan* [1935] P. 120, 126, both parties were simultaneously making the same statement for a common purpose, and neither could be estopped as against the other by the making of it. If the woman had acted to her own detriment she did not do so on the faith of any statement by the petitioner. Mr. Justice Langton, however, raised the quære whether the decision of an issue as to the validity of a marriage which involves status and is of public interest can be governed by an estoppel *inter partes*.

Filing of pleadings pursuant to the directions of the arbitrators and agreeing to a trial of the dispute on the issues raised by the arbitrators cannot be regarded as reference of specific questions implying an agreement between the parties that they intended to give up their right to resort to the Courts even if the award was vitiated on account of an error apparent on the face thereof.¹

Estoppel against estoppel.—Estoppel against estoppel sets the matter at large; but no evidence however strong, is enough to do so unless it would be itself conclusive.²

Indispensability of consideration.—Under Section 25 of the Indian Contract Act, an agreement made without consideration is void, that is, unenforceable,³ unless (1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in near relation to each other, or unless (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily, that is, otherwise than at the desire of the promisor, done something for the promisor, or something which the promisor was legally compellable to do, or unless (3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In these three cases an agreement, though without a consideration in the sense of the English Common law, will be a contract, that is, an enforceable agreement. Thus, subject to some exceptional cases, consideration is indispensable for a formation of a binding contract in India.⁴ For 'voluntariness', see under Section 25, *post*.

For lawful and unlawful consideration see Sections 23 and 24, respectively. For further discussion on indispensability of consideration see *English law of contract and consideration, infra*. See also the *Illustrations* given below.

1. *Union of India v. Rallia Ram*, A.I.R. 1963 S.C. 1685.

2. *Queen v. Haughton (Inhabitants)*, 1 El. & Bl. 501 at 506 : 118 E.R. 523 at 525 (*per Lord Campbell, C. J.*).

3. *Lakshanaswami v. L. I. C.*, A.I.R. 1963 S.C. 1185.

4. *Lakshanaswami v. L. I. C.*, A.I.R. 1963 S.C. 1185.

English law of contract and consideration.—"In every contract there must be *quid pro quo* for *contractus est quasi actus contra actum*."¹

In England, to sustain an action on a promise made by the promisor to the promisee the latter must show that the promise is supported by the presence of consideration or that it is contained in a document under seal. It is a general rule that in cases of simple contract, if one party makes a promise to another for the benefit of a third, as no consideration moves from such third person, it is only the party to whom it is made, and not the party for whose benefit it is made, who may maintain an action upon it; but if a trust be created for the third party there is a departure from the rule and the third party can sue. The promisor's promise must have been offered in return for an act done or a counter-promise made by the promisee. An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought and the promise thus given for value is enforceable.²

All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol. Specialties are in the form of a deed,³ that is, under seal. When agreements are not specialties they are parol, and a consideration must be proved.⁴ Parol means simple contracts whether written or oral, as distinguished from contracts by deed, and requires valuable consideration for its enforceability. A promise in the form of a specialty, that is, when made under seal, may be sued on even though it was made without consideration.

1. *Co. Litt.* 47, b. See Hargrave & Butler, 1832 ed., vol. 1.

2. *Dunlop v. Selfridge*, [1915] A.C. 847, 855.

3. Deed is a formal document on paper, or parchment duly signed, and delivered. It is either an indenture needing an actual indentation made between two or more persons in different interests, or a deed-poll made by a single person or by two or more persons having similar interests.

The requisites of a deed are these :—

(1) Sufficient parties and a proper subject of assurance ;

(2) It must be written, engrossed, printed, lithographed, or partly written or engrossed, and partly printed or lithographed in any character or in any language, on paper, vellum, or parchment, since these materials best unite the two qualities of durability and difficulty of concealing alteration or erasure ;

(3) The language employed should be sufficient in point of law, intelligible without punctuation, and clear without the aid of stops or parentheses.

Usage has arranged the text of conveyance *inter partes* in a formal and well understood sequence ; and although it is not absolutely necessary that a deed should be drawn in accordance with the generally received formulary, provided it exhibit the intention of the parties, yet it is not advisable to deviate from it unless in a matter of urgent necessity—(Wharton : *Law Lexicon*, 1957, 308. See also *Dictionary of English Law*, 1959, vol. 1, 591-95).

A contract is not essential to a deed ; and a power of attorney under seal, in England, to transfer governmental stock is a deed. Deed is thus clearly not confined to contract—(Stroud : *Judicial Dictionary*, 1952, 753).

All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol. There is no third class, as contracts in writing. If they be merely written and not specialties, they are parol and a consideration must be proved. Specialty is a synonym for deed—*Rann v. Hughes* (1778), 7 Term Rep. 350, n.

4. *Rann v. Hughes*, (1778), 7 Term Rep. 350.

A promise under seal, such as covenant or bond, does not require any consideration to be enforceable at law by an action upon the covenant or by damages for breach or any other remedy or defence in law, but the claim is always open to any defences arising out of want of any consideration in fact or otherwise available to the covenantor in equity, and equity will not enforce covenant without consideration unless the covenant has been executed in law, or a trust had been declared in performance of the promise. If the promisor cannot show a reason in equity why he should not execute his promise according to his deed in law, equity will not intervene to help him, but if the promisee cannot show more than a promise in legal form, equity will not exert its auxiliary jurisdiction in his favour.

In regard to the transfer of property as distinguished from contract to transfer property of any description, consideration plays an important part as evidence of the intention of the transfer. In the absence of consideration or an express or implied trust, the solemnity of the transfer even though by deed or registration, i.e., the legal completion of the transaction, will not, as between the grantor and grantee, import either consideration or evidence that the grantor intended to divest himself of the beneficial interest.

Consideration¹ consists in any act of the promisee, that is, the person claiming the benefit of the obligation, from which the promisor, that is, the person burdened with the obligation, or a stranger, that is, a person other than the promisor, derives a benefit or advantage, or any labour, detriment or inconvenience sustained or suffered by the promisee at the request, express or implied, of the promisor.² It is an act of the promisee from which the promisor derives or expects to derive³ a benefit or advantage, or any labour, detriment, or inconvenience, sustained by the promisee; and however small the benefit or inconvenience may be, it is a significant consideration, if such act is performed, or such inconvenience suffered, by the promisee at the request or with the consent, either express or implied, of the promisor.

Where there is one consideration stated, the promisee may prove any other consideration which existed that is not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.⁴ Consideration is the price, motive or inducement for a promise or for a transfer of property from one person to another. The nature or quality of the consideration which will be sufficient for these purposes varies with the nature of the transaction and in the absence of consideration the Courts will, in England, except in the case of a simple contract, accept other evidence from which the intention will be inferred. A simple contract, that is to say, a promise by word of mouth or in writing which is not a deed, requires valuable consideration to support it,

1. Wharton : *Law Lexicon*, 14th ed., 1953, 235.

2. *Carlill v. Carbolic Smoke and Ball Co.*, [1893] 1 Q.B. 271.

3. *Haigh v. Brooks*, 10 A. & E. 309.

4. *Frith v. Frith*, [1906] A.C. 254; *Clifford v. Turrell*, 1 Y. & C. Ch. 148.

but if the promise is by deed, even the expressed absence of any consideration will not affect its validity either in law or equity except for some kinds of equitable relief, because the execution of a deed is attended by formalities from which a deliberate intention to make a binding promise is presumed. Valuable consideration may be described as the very life and soul of a simple contract or parol agreement. Consideration, in the case of a simple contract or parol agreement, is thus the fact which the Courts require as evidence of intention, (a) that a person intends his promise to be binding on him, or (b) that he intends to divest himself of a beneficial interest in property. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, according to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.¹ Valuable considerations may be a benefit to the promisor or loss or injury sustained by the promisee. The consideration and the promise may not be equivalent in actual value, but the consideration should not be so insufficient as to 'shock the conscience', in which case equity would quash the contract, upon the ground that such great inequality betokens mutual mistake, or fraud, or undue advantage on the one side, or mental incompetency on the other, and in equity, inadequacy may be a reason for refusing specific performance.² A valuable consideration may also be a forbearance for a time to institute a suit upon a well-founded claim, or even upon one which is doubtful, but not upon one utterly unfounded; and such consideration is sufficient, since it is a benefit to the one party and a prejudice to the other. If the time for forbearance be stated, it must be a reasonable time, and an agreement to *forbear per breve aut paululum tempus*, or *pro aliquo tempore*, will not be sufficient, inasmuch as the party promising may, in such case, sue immediately after the promise is made.

Mutual promises are concurrent considerations, and will support each other if they be made simultaneously, unless one or the other be void.

So-called *gratuitous* or voluntary promises are void for want of a reciprocal return however obligatory they may be in morals or honour.³ A moral consideration founded upon mere affection or gratitude will not support a simple contract. A moral consideration is thus not a valuable consideration. For a detailed discussion as to sufficiency and insufficiency of consideration see *Need for consideration and its sufficiency, infra*.

An offer made with liberty to consider it for a limited time may be revoked at any time before such limited time has expired. In the absence of a consideration moving from the offeree there is no binding contract to keep the offer pending for a limited time.

A owed B £ 100, and B agreed to take and takes £ 90 in full satisfaction for the debt, without any other or fresh consideration; B could never-

1. *Fleming v. New Zealand Bank*, [1900] A.C. 577.

2. *Muthukaruppa v. Kathappudayan*, (1914) 25 I.C. 726.

3. *Lakshmanaswami v. L. I. Co.*, A.I.R. 1963 S.C. 1185.

theless sue A for the remaining £ 10. A promise to pay by instalments was, similarly, not a sufficient consideration for extending time for a payment which was due immediately. This was so under the strict common law of England. In India there have been statutory provisions under the Indian Contract Act, 1872, for granting relief to the debtor in question. In England, too, the doctrine of promise as quasi-estoppel has been evolved for awarding relief to the debtor in certain given circumstances. For the doctrine of promise as estoppel, see, *ante*. See also under Section 63, *post*.

Considerations may be illegal and impossible. A contract may be illegal because it contravenes the principles of the common law or the special requirements of a statute. The former illegality exists whenever the consideration is founded upon a transaction which violates public policy or morality. A contract to commit, conceal or compound a crime; a contract for illicit cohabitation; or a contract in fraud of the rights and interests of the third parties are illegal. The illegality created by statute exists when the act is either expressly prohibited, or when the prohibition is implied from the nature and object of the statute.

A contract founded upon an impossible consideration is void; for the law will not compel a man to attempt to do that which is not within the limits of human capacity.

Need for consideration and its sufficiency.—‘Consideration’ is the material cause of a Contract, without which no contract can bind the parties. This Consideration is either Expressed, as when a man bargaineth to give 20 s. for a horse—or, is Implied, as when the Law it selfe enforceth a Consideration, as if a man comes into a Common Inne and, there staying some time, takes meat or lodging or either for himselfe or for his horse, the Law presumeth that he intendeth to pay for both, notwithstanding that nothing bee further covenanted betweene him and his host (*Termes de la Ley*).¹ “In every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*.”² *Nudum pactum* (a naked agreement) is an agreement made without consideration. Unless it is specially allowed by common or statutory law, no action will lie upon such an agreement.

As has been seen before, consideration is the price given by one party for the promise made by the other. It is the symbol of the bargain made. It is the recompense given by the party contracting to the other. The promise given by one party is, subject to some exceptions, nugatory, that is, not binding or enforceable when it was not given in exchange of some consideration moving from the other. The party seeking to enforce an agreement has to show that either he has conferred some benefit upon the other party in return for which the promise sought to be enforced was given by the latter, or that he incurred some detriment or loss for which

1. Stroud : *Judicial Dictionary*, 3rd ed., 1953, vol. 1, 587.

2. Co. Litt. 47. b. See Hargrave & Butler, 1832 ed., vol. 1.

the promise sought to be enforced was given. Thus a consideration of loss or inconvenience sustained by one party at the request of the other is as good a consideration in law for a promise by the latter as a consideration of profit or convenience to the latter.¹ This detriment to the plaintiff or benefit to the defendant must be something of value in the eye of the law, though the adequacy of such value is not relevant for the formation of a binding contract.² This valuable consideration in the sense of the law may thus consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.³ Thus where one party agrees to do something on the terms that the other also agrees to do something, the agreement will be enforced if what the first party has agreed to do is either for the benefit of the second or to the trouble or prejudice of himself, provided this benefit was done or the trouble or prejudice undertaken or incurred at the desire of the second and not voluntarily.⁴ Not only an act or forbearance of one party is deemed in law as the price for which the promise of the other is bought, but also the promise of an act or forbearance is considered in law as a price given by one party for the promise made by the other.⁵ Thus mutual promises may also constitute valid considerations one for the other. When either of the parties has shown his willingness to fulfil his own promise, he may through law compel the other to fulfil his.⁶

Under the English common law, earlier, a party could enforce an agreement if a promise had been given in his favour even where the consideration had been satisfied by a third party.⁷ In course of time it was insisted that the consideration must move from the promisee himself.⁸ Further, under the modern English common law, the party in whose favour a promise has been given must not only supply the consideration but must also be a party to the agreement concerned in order to be able to enforce it. Thus, generally speaking, where either of these two elements is lacking, namely, the supply of the consideration by the beneficiary himself and his being a party to the contract which is being sought to be enforced, he cannot enforce the contract. Under the Indian law, according to Section 2 (d) of the Indian Contract Act, 1872, it is not necessary that the consideration must move from the beneficiary himself in order to enable him to enforce the contract in his favour. Under the Indian law, the consideration may be satisfied, supplied or executed by any third person. It must be so done

1. *Hunn v. Guy* (1803) 4 East. 190.

2. *Thomas v. Thomas* (1842) 2 Q.B. 851. *Kulasekaraperumal v. Pathakutty* A.I.R. 1961 Mad. 405.

3. *Currie v. Misa* (1875) L.R. 10 Ex. 162.

4. *Bolton v. Madden* (1873) L.R. 9 Q.B. 55.

5. *Dunlop v. Selfridge* [1915] A.C. 847, 855.

6. *Harrison v. Cage* (1698) 5 Modern Rep. 411.

7. *Dutton v. Poole* (1678) 2 Levinz 210.

8. *Price v. Easton* (1833) 4 B. & Ald. 433; *Thomas v. Thomas* (1842) 2 Q.B. 851.

at the desire of the promisor.¹ The beneficiary in order to entitle himself to the benefit of the promise must however be a party to the contract sought to be enforced. But both in England and in India, this condition, namely, that the beneficiary to the contract must be, in order to be able to enforce the contract, a party to the contract is, however, subject to some exceptions. The nature and extent of these exceptions have been considered in detail while discussing the head *Rights and obligations of third party to contract*, for which see under Section 2 (h), *infra*.

In India, too, subject to exceptional cases, consideration is essential for the formation of a binding contract.²

Sufficiency of consideration.—Where a transaction has been voluntary the Court of law while enforcing a contract will not undertake to evaluate the advantages and disadvantages of the respective parties thereto. Thus, even a very small act done by the plaintiff as the consideration will entitle him to ground an action.³ When elements of a bargain are there in a transaction between two parties, the Court will not weigh the advantages of one party against those of the other.⁴ In other words, the Court is not concerned with the adequacy of the consideration. That is, while ordinarily consideration is a *sine qua non* for the enforceability of a contract, its adequacy is not. The benefit of the one party need not be, in the eye of the law, commensurate to the detriment of the other. Thus, even the compromise of a doubtful claim has been held to be valid, the question of adequacy of the consideration being irrelevant.⁵ The giving up of the claim on the part of the promisee, whether it would be tenable when mooted in a court of law or not, is construed as an adequate consideration. A forbearance to sue, as undertaken by an express agreement or by conduct as implicit from circumstances, is also considered an adequate consideration.⁶ Similarly, in the context of consideration, technically speaking, sufficient means valuable. It does not necessarily mean equivalent or adequate.

“A valuable consideration may be money or money’s worth; and in this connection ‘valuable’ means real, as distinguished from a consideration that is merely illusory or nominal; but it does not mean equivalent. A debt not yet payable may be a valuable consideration.⁷ For a debt to be a valuable consideration for a security or obligation there must be an agreement express or implied to give time or some further consideration,

1. *Firm Gopal Co. Ltd. v. Firm Hazarilal Co.* A.I.R. 1963 M. P. 37.

2. *Lakshmanaswami v. L. I. C.*, A.I.R. 1963 S.C. 1185.

3. *Sturlyn v. Albany* (1587) Cro. Eliz. 67, 150 : 78 E.R. 327, 408.

4. *Thomas v. Thomas* (1842) 2 Q.B. 851 ; *Alexander v. Rayson* [1936] 1 K.B. 169.

5. *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 291 ; *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.

6. *Alliance Bank v. Broom* (1864) 2 Dr. & Sm. 289.

7. *Davies v. Bolton*, [1894] 3 Ch. 678.

or else there must be an actual forbearance which *ex post facto* may become the consideration.¹ Marriage generally is a valuable consideration for a settlement²; but not necessarily so if contracted with the settlor's concubine, nor, in deed, in any case where there is evidence of an intent, of which the wife is cognizant, to make the celebration of marriage part of a scheme to protect property against creditors.³ A *bona fide* compromise is valuable consideration for the purposes of Section 45 (1) of the English Bankruptcy Act, 1914. A description, in particulars of sale, as "valuable business premises" of a shop which was subject to a restrictive covenant prohibiting its use for the purpose of any business other than that of a ladies' outfitter, fancy draper and manufacturer of ladies' clothing, was held misleading; a purchaser relying on it was accordingly released from the contract.^{4,5} For insufficiency of consideration, *see* below.

Insufficiency of consideration.—Under the English common law, the expression "sufficiency of consideration" is sometimes used in contradistinction to "inadequacy of consideration". It has been seen before that consideration is generally a *sine qua non* for the enforceability of a contract though its adequacy is not. Whether a consideration is, from a commercial standpoint, adequate or not, it is in most cases of contract indispensable to render a contract enforceable. Where there has been no consideration at all, the plaintiff's claim will be baseless. Thus, for example, where the plaintiff has done something for the defendant which he was otherwise also compelled to do for him, he has not supplied any consideration at all to base a new agreement sought to be enforced against the defendant. This doing something by the plaintiff in favour of the defendant, in the given circumstances, is not considered to be a consideration at all. In other words, under the English common law, it will be a case of insufficient consideration, that is, of a consideration, if it be one at all, not sufficient to base a binding agreement thereon. The word "insufficient" in this context is used as opposed to "inadequate", though such a use of the expressions "insufficient" and "inadequate" with their cognate expressions is likely to cause confusion to a layman.

If a person does something in obedience to a duty imposed by law upon him and the act done benefits another, and the latter person makes a promise with the first-named person on the basis of the thing done as the consideration, the promise so made will not be enforceable because it will be deemed to have been based on an insufficient consideration, that is, no consideration at all.⁶

1. *Wigan v. English and Scottish Life Assurance*, [1909] 1 Ch. 291; *Re Wethered*, [1926] Ch. 167.

2. *Re Rees*, [1904] 2 K.B. 769; *Re Bahrend*, 55 S.J. 459.

3. *Colombine v. Penhall*, 1 Sm. & G. 228; *Bulmer v. Hunter*, L.R. 8 Eq. 46; *Re Pennington*, 5 Morr. 216.

4. *Hunt (Charles) Ltd. v. Palmer*, [1931] 2 Ch. 287.

5. Stroud: *Judicial Dictionary*, vol. 4, 1953, 3196.

6. *Collins v. Godefroy* (1831) 1 B. & Ad. 950; *Morris v. Burdett* (1808) 1 Camp. 218.

In the given case, the promisee does no more than what he was already legally or contractually bound to do in favour of the promisor and accordingly the consideration will be deemed insufficient to bind the promisor for the fresh promise made.¹ When, however, the consideration moving from the plaintiff has been something in addition to the discharge of the duty imposed on him by law, the Court will not hold as insufficient as a consideration the act so done by the plaintiff.² Here, in the given case, the promisee has done something in addition to his contractual obligation as existing from before and so the promisor will be naturally bound, because the additional service would be a sufficient consideration. Further, in given circumstances, the earlier obligation may be removed by fresh obligation and thus even the same sort of consideration or even a lesser consideration, as judged from the point of view of its adequacy, will be considered as a sufficient consideration rendering the fresh promise enforceable.³

The execution of a consideration as well as the promise to execute it have been held as a sufficient consideration for an enforceable agreement with a party even though the person from whom the execution of the consideration or the promise to execute it has moved had already been under a contractual liability with a third party to supply or satisfy the said consideration.⁴

The performance of an outstanding contractual obligation is a sufficient consideration for a promise to a new party. The promise of performance is also equally valid.

As seen before, even the surrender of an untested claim to a legal right is considered in these days as a sufficient consideration. When, however, the claim had been based nor even on the shade of the shadow of a legal right, and the release of such a claim is claimed to have been the consideration for a promise, the Court will find it insufficient and hold the promise to be unenforceable. Thus, a mere vexatious or frivolous claim where released will not constitute a sufficient consideration. Similarly, the release of a claim posed to the promisor on the basis of a suppression of facts, though such facts were known to the promisee, and but for the suppression of which facts, the claim would be exposed in its futility, will not be upheld as a sufficient consideration.

A bailment of goods for safe custody is not a contract in the sense of the English common law inasmuch as it is not based on any consideration, though such a bailment may be saddled in law with some of the incidents of a contract. Where, again, the performance of a gratuitous service results in a loss or damage to the person to whom the gratuitous service had been

1. *Stilk v. Myrick* (1809), 2 Camp. 317; *Harris v. Watson* (1791), Peake 102.

2. *Glasbrook Bros. v. Glamorgan County Council* [1925] A.C. 270; *England v. Davidson* (1840) 11 Ad. & E. 856.

3. *Hartley v. Ponsonby* (1857) 7 E. & B. 872.

4. *Chichester v. Cobb* (1866) 14 L.T. 433; *Scotson v. Pegg* (1861) 6 H. & N. 295; 3 L.T. 753; *Shadwell v. Shadwell* (1860) 9 C.B.N.S. 159; 30 L.J. (C.P.) 145.

rendered, the person rendering the gratuitous service will be held liable for torts and not for damages in contract because no sufficient consideration had moved from the person receiving the gratuitous service in favour of the person rendering the said service.

The insistence on a sufficient consideration under the English common law made it difficult, from the point of view of logic, for the Courts to enforce the promise of a creditor to discharge the debtor for the whole debt when he had undertaken to so release the debtor on the payment of only a part of the debt outstanding and when in fact the debtor or in order to benefit him somebody else has actually made the part payment. From the point of view of logic and consistency it used to be argued that the promise of discharge had not been based on any consideration because the debtor by part payment has fulfilled only a part of his obligation as created by the earlier contract of debt, and also, when the part payment came from a stranger though intending to benefit the debtor, it was equally argued that the contract of release was entered into between the creditor and the stranger, the original debtor being only a stranger to the promise of discharge sought to be enforced. The consideration in the latter case has not come from the debtor himself though under the English common law there is the insistence that the consideration must move from the promisee, that is, the debtor himself. A strict compliance with the English common law would thus render the creditor's promise of discharge on partial payment an unenforceable one. The English Courts have however allowed, comparatively recently, the creditor's promise to be binding on him on the plea that otherwise it would be a fraud on the part of the creditor upon the debtor¹ as well as the stranger² who made the part payment with a view to getting the debtor discharged. Confining the discussion to the part payment by the debtor himself, it may be observed that apart from the question of fraud, the rule of equitable estoppel may well enable the Court to hold the promise of release of the entire debt binding against the creditor on the debtor making the part payment as a party to the contract of release. See *Promise as estoppel*, ante. See also under Section 63, post.

Illustrations of consideration.—Under Section 2 of the English Infants Relief Act, 1874, no action is allowed upon any promise made after full age to pay a debt contracted during infancy.

Under Section 27 of the English Bills of Exchange Act, 1882, valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract, or (b) an antecedent debt or liability. This antecedent debt or liability must be that of the maker or negotiator of the instrument and not of a stranger.³ For negotiable instruments in India see, *infra*.

1. *Hirachand v. Temple* [1911] 2 K.B. 330; *Cook v. Lister* (1863) 13 C.B. (N.S.) 543, 595; *Wood v. Roberts*, (1818) 1 Starkie 417.

2. *Welby v. Drake* (1825) 1 C. & P. 557.

3. *Oliver v. Davis* [1949] 2 K.B. 727; [1949] 2 All E.R. 353.

Under Section 23(4) of the English Limitation Act, 1939, if the debtor, after the debt has been barred, acknowledges the creditor's claim, the plaintiff may sue on this acknowledgment. No promise, express or implied, is necessary, and no consideration need be sought.

Moral obligation does not suffice to constitute consideration.¹ A transfer in consideration of an expectation of a spiritual and moral benefit is a transfer without consideration in the sense of the law of contract.²

In a case of accord and satisfaction the accord is the agreement to discharge the existing obligation, and the satisfaction is the consideration required to support the accord. In an accord and satisfaction, therefore, some sufficient consideration is indispensable.

For the work done by the plaintiff under a contract entered into with the defendant the latter sent a sum by cheque to the former requesting him to accept the same in full and final settlement of all the plaintiff's claim against the defendant and to return the enclosed receipt duly signed by the plaintiff. The plaintiff received the payment but did not return the receipt as required by the defendant but on the contrary before cashing the cheque sent a letter to the defendant through a pleader informing him that he was entitled to something more. It was held that the acceptance of the payment by the plaintiff in the circumstances, was not in full and final settlement of his claim and did not amount to accord and satisfaction but was in partial satisfaction of his claim and the plaintiff was not estopped from claiming the balance alleged to have been due to him.³ Where the debtors, knowing that the creditors claimed a certain amount, sent them a cheque for a smaller sum, with a condition that it was to be taken as in full satisfaction of the claim, and the creditors cashed it and then wrote intimating that they did not agree to the condition, it was held that the acceptance of the cheque by the creditors was not a conclusive proof of acceptance of the condition and did not preclude them from suing for the balance of their claims.⁴ Where after the forfeiture of the lease the lessee remits certain amount to the lessor as rent and intends it as payment of rent and the landlord accepts it only as damages for use and occupation, the acceptance of payment by the landlord must be deemed to be as rent and operates as a waiver of the forfeiture.⁵ Where the proprietor of an estate made a payment in respect of arrears of revenue, and in the document which accompanied the payment to the Government, expressly appropriated it to the satisfaction of a particular *kist*, and the money was accepted and acknowledged by the Treasury Officer

1. *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438.

2. *Kanak Sunder v. Ram Lakhan*, A.I.R. 1955 Patna 458; *Debi Saran v. Nandalal* 125 I.C. 127; A.I.R. 1929 Patna 591.

3. *Tata Locomotive and Engineering Co. Ltd. v. Kartar Singh* A.I.R. 1961 Patna 37; *Day v. McLea* (1889) 22 Q.B.D. 610 and *Ackroyd v. Smithies* (1885) L.T. 130 relied on.

4. *Basdeo Ram Sarup v. Dilsukh Rai* (1922) 44 All. 718; A.I.R. 1922 All. 461.

5. *Chotu Mia v. Mt. Sundri* (F.B.) 24 Patna 109; A.I.R. 1945 Patna 260; *Craft v. Lumley* (1858) 10 E.R. 1459 relied on.

as paid on that account it was not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction, by altering the appropriation in which both originally concurred. Sections 59 and 60 of the Contract Act relating to the appropriation of payments might have been applicable to the case, if the parties to the transaction had not by their own actions placed the matter beyond doubt.¹ An independent agreement of reconveyance of the property sold cannot be held to be without consideration merely because there is no separate consideration for it beside the price for which the property is agreed to be sold.² The promise to do a thing which the promisee was already bound to do under a contract with a third party can be a good consideration.³ Where a party has secured the promise of another by discharging or promising to discharge a duty already imposed upon him as the result of another affair, this act or promise will amount to a consideration. For a conflicting view, see *supra*.

The words "at the desire of the promisor" in clause (d) of Section 2 of the Indian Contract Act, 1872, imply a promise which has a real effect in conducting to the contract.⁴ The mere fact that at the desire of the promisor the promisee has done something prior to an agreement is not sufficient to make the subsequent agreement a contract. Whether or not the agreement will be held to be a contract depends upon whether or not the promisee intended to impose upon himself a legally enforceable liability. The circumstance that the promisee has left to himself the option of revoking the promise at his mere will, or of otherwise putting an end to the duration of the promise will in itself negative any intention on the part of the promisee to impose upon himself a legal liability.⁵ A consideration must be good and valuable.⁶

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, or suffered, or undertaken by the other. A transfer in consideration of natural love and affection is not a transfer for consideration within the meaning of Section 2(d) of the Indian Contract Act. In law a consideration in a contract for sale, as in all other contracts under the Contract Act, must be a good and valuable consideration. Therefore, a meritorious or a gratuitous consideration such as natural love and affection or obedience and submission by way of respect or love may at best be a meritorious or a gratuitous consideration and in no

1. *Mahomed Jan v. Ganga Bishun Singh* (1910) 38 I.A. 80; (1910) 38 Cal. 537 P.C.

2. *Bipin v. Masrab* A.I.R. 1961 Ass. 173.

3. *Firm Gopal Co. Ltd. v. Firm Hazarilal Co.* A.I.R. 1963 M.P. 37.

4. *Vishveshvar v. Sadashiv*, (1925) 27 Bom. L.R. 1456; (1925) 93 I.C. 930; A.I.R. 1926 Bom. 54; *Firm Gopal Co. Ltd. v. Firm Hazarilal Co.* A.I.R. 1963 M.P. 37.

5. *Inuganti v. Chelikani* (1915) 29 M.L.J. 538.

6. *Muthukaruppa v. Kathapudayan* (1914) 25 I.C. 726; *Kulasekaraperumal v. Pathakutty* A.I.R. 1961 Mad. 405.

for out of the monies subscribed.¹ The defendant promised to pay to the plaintiff, a District Board, a certain amount by way of personal contribution for the purpose of constructing a bridge over a river. The personal contribution was enforceable.²

P and *D* entered into an agreement which among other matters stated that *P* should abolish her bazar at a certain place within her zemindari, which bazar she had established in opposition to a bazar belonging to *D*. It was further stated that *D* should pay *P* Rs. 25 per year in lieu of her income from that bazar. *D* also undertook that, so long as this annual payment was continued, she should not establish any new bazar within two miles of the bazar of *D*. Later, *P* sold the site of her former bazar together with some other land. *D* then refused to make the payment of Rs. 25. It was held that whether the payment was to be made in consideration of her abolishing the bazar or in consideration of *P*'s undertaking not to establish a new bazar within two miles of *D*'s bazar, she had disentitled herself to a continuance of the payment from the time when she made it impossible for herself to secure the fulfilment of the condition by parting with the land.³

The plaintiff sued to establish an agreement in writing by which the defendants promised to pay him a commission on articles sold through their agency in a bazar in which they occupied shops, in consideration of the plaintiff having expended money in the construction of such bazar. Such money had not been expended by the plaintiff at the request of the defendants, nor had it been expended by him for them voluntarily, but it had been expended by him voluntarily for third parties. It was held that such expenditure was not any consideration for the agreement within the meaning of Section 2 (d), and the agreement did not fall within clause (2) of Section 25, and was void for want of consideration.⁴

Services rendered are a good consideration.⁵ A promise to afford future personal service is a good consideration.⁶ Where the father of a minor daughter enters into a contract of service on her behalf with the defendant, the contract is void for being without consideration. If the girl were a major, instead of a minor, such a promise to serve would be a good consideration within the meaning of Section 2 (d) though the consideration moved from the third party. Where the girl is a minor, under Section 11 she is not competent to contract and her promise would not be enforceable against her. Consequently, her promise to serve will supply no consideration for the promise of the defendant to pay her a salary. The promise of infants

1. *Kedarnath v. Gorie Mahomed*, (1886) 14 Cal. 64.

2. *District Board of Ramnad v. Md. Ibrahim*, 64 M.L.J. 574.

3. *Sarat v. Bhuben*, (1898) 3 C.W.N. 182.

4. *Durga Prasad v. Baldeo*, (1880) 3 All. 221.

5. *Sindha Shriganpatsingji v. Abraham*, (1895) 20 Bom. 755.

6. *Sri Mahadeoji v. Baldeo Prasad*, A.I.R. 1943 Oudh 89.

is not held to be a promise in law or to constitute a consideration for another promise. There being no contract enforceable at law, there can be no breach on the part of the defendant in respect of which the minor girl or her father can sue for damages.¹

A minor borrowed a sum of money, executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan plus interest thereon. It was held by majority that a suit upon the second bond was not maintainable as that bond was without consideration and did not come under Section 25 (2) of the Indian Contract Act. Mukherjee, J., as a dissenting judge held that Section 25 (2) applied to the case and that the second bond was not void for want of consideration. It may be submitted that the view of Mukherjee, J., is not tenable in that a minor's debt in the instant case was no debt at all. Consideration received by a person during his minority cannot be a good consideration for a fresh promise by him after his attaining majority and such transaction does not fall within Section 25 (2).² An undertaking for *kharach-i-pandan* is enforceable.³

If a promisee chooses to proceed against one of several co-promisors liable alternatively under a contract and obtains a judgment against him, he has no right to proceed against the other co-promisors.⁴ Acknowledgment of a debt to the creditor is enforceable.⁵

A gift made by a coparcener in pursuance of a promise in consideration of marriage is an alienation for consideration within the rule of Hindu law and is valid and is enforceable against the alienor's share.⁶

Where a man and a woman, both of whom are *sui juris*, agree to marry, there is a contract, the promise of each being the consideration for the promise of the other. When however the parents of a minor boy and a minor girl arrange a marriage between them, the position is different. Whether a marriage eventually takes place must depend on the will of the minors and not solely on that of their parents. Such arrangement is an agreement only, a mere *nudum pactum* and not a contract, that is, an enforceable agreement.⁷

If an agreement is in settlement of a bona fide dispute between the parties, the settlement of the dispute itself is a good consideration for the contract. In every case of compromise the right will be on one side or the other, and, therefore, if at the time of entering into the agreement, the

1. *Raj Rani v. Prem Adib*, A.I.R. 1949 Bom. 215; *Raghava v. Srivastava*, 40 Mad. 308; A.I.R. 1917 Mad. 630.

2. *Suraj Narain v. Sukhu Ahir*, (F.B.) (1928) 51 All. 164; A.I.R. 1928 All. 440.

3. *Khwaja Muhammad v. Husaini Begum*, (1910) 7 I.C. 237.

4. *National Petroleum Co. Ltd. v. Popatlal Mulji*, (1936) 38 Bom. L.R. 610.

5. *Debnarayan v. Chunilal*, (1913) 41 Cal. 137.

6. *Nanjundasamy v. Kanaguraju*, (1918) I.C. 666.

7. *Janak Prasad v. Gopi Krishna*, A.I.R. 1947 Patna 132.

Where a promissory note is executed for services performed for the executant by the person in whose favour it is executed the promissory note is for consideration.¹

Where a promissory note is executed for a consideration of the debt due on accounts but the amount was not credited in the accounts on execution of the note and it was contended that the note should be held without consideration on that ground, it was held that whether it was for consideration or not did not depend upon the plaintiff's method of accounting and his failure to do something consequential to the pronote. What mattered was what had gone before the note was executed and not after. As the note was for a debt as shown by the account, it was not without consideration.²

Where a person executes a handnote in favour of a Bank on the basis of which he receives a substantial benefit of having a current overdraft account with the Bank, the handnote cannot be said to be without consideration.³

Where *A* and *B* execute a pronote for the amount due under a decree against *A* alone, abandonment by the promisee of his decree against *A* is a sufficient consideration for *B*'s liability under the pronote.⁴

A, the plaintiff's father, by a letter gave an undertaking to *B*, the defendant's natural father, that he would supply money for the litigation if the defendant's adoption was challenged. The letter read:

"If *P* were to file a suit against you in respect of the said adoption and if either you or the said adopted boy should have to spend money in filing answer, etc., we are ready to bear the said expenses. . . . If *R* (the adoptive mother) does not advance moneys for the expenses of the case we shall without fail advance for expenses and have case conducted without fail."

In pursuance of this undertaking *A* advanced moneys to the defendant from time to time for the expenses of the litigation and after the death of *A* the plaintiff also did the same thing. Subsequently the defendant on request of the plaintiff executed a promissory note for the total amount advanced for the litigation, and it was stipulated therein that if the litigation was decided against the defendant in the Privy Council the plaintiff would not enforce the note. The litigation ended in favour of the defendant. The plaintiff therefore sued him on the said note. The defendant denied his liability and contended that the pronote was void for want of consideration. It was held in the circumstances that the letter of *A* contained an unconditional undertaking on part of *A* to provide money for expenses of the case implying thereby the case in all its stages and to have it conducted if *R* did not advance money for the same. The word "advance" did not

1. *Dungarmull v. Sambhu Charan*, A.I.R. 1951 Cal. 55.

2. *Khimji Punja & Co. v. Devshi Bhanji*, A.I.R. 1950 Kutch 24.

3. *Abdul Kader v. Tripura State Bank, Ltd.*, A.I.R. 1953 Tripura 10.

4. *Gopala Maller v. Velloth Krishnan*, A.I.R. 1942 Mad. 134.

connote any idea of repayment. It was also held that as the advances of money were not made at the "desire" of the defendant within the meaning of Section 2 (d), the pronote was without consideration.

It was also held that Section 25 (2) was not applicable to the case. To invoke the aid of that provision it must be shown that there was a promise by the defendant to compensate the plaintiff or his father for something which had been already done by them voluntarily for him. The moneys were not advanced "voluntarily" but because of the undertaking given by the plaintiff's father. In executing the promissory note the defendant was not promising to compensate the plaintiff for something which had been done for him voluntarily.¹

A promissory note given by a Hindu on a promise made by his father cannot be enforced against him as a pious obligation if the promise was repudiated by the father or is otherwise not enforceable.²

Property in the goods vests in the acceptor, though the bill of lading remains with the holder of the bill of exchange to secure the price. Consideration does not fail if the acceptor is put in a position to take delivery of the goods.³

Where a widow mortgages the property inherited by her from her husband to pay a decretal debt due from her husband and subsequently not being able to meet her liability under the mortgage, again executes two mortgages one after another in respect of the property to save it from being sold by the creditor, the two subsequent mortgages being the necessary consequence of the first mortgage, the widow in executing them must be deemed to have acted in a reasonable manner and the last mortgage sued upon is binding on the estate.⁴

Where in a mortgage bond two considerations are stated, one of which is valuable and is separable from the other, effect may be given to the instrument to the extent of the amount of the consideration that is valuable, and to that extent the transaction cannot be regarded as fraudulent.⁵ The consideration paid to any one of several joint promisors is legally sufficient to support the promise of all joint promisors.⁶

The sale itself forms the consideration for the agreement to reconvey.⁷

In a separation agreement under seal the husband agreed to pay the wife the monthly sum of £ 30, and he regularly paid this sum without making any deduction for tax or accounting for it to the Inland Revenue. Some

1. *Raja of Venkatagiri v. Krishnayya*, A.I.R. 1948 P.C. 150.

2. *Perumal v. Sendanatha*, A.I.R. 1918 Mad. 311.

3. *Motishaw & Co. v. Mercantile Bank of India*, (1917) 41 Bom. 566.

4. *Bushana Rao v. Subbaya*, A.I.R. 1936 P.C. 283 ; *Hunoomanpersaud v. Babooe Munraj Koonweree*, (1854-57) 6 M.I.A. 393 P.C. relied on.

5. *Rajani v. Gaur*, (1908) 35 Cal. 1051.

6. *Sornalinga v. Pachai*, (1915) 38 Mad. 680.

7. *Kanakasabapathi v. Govindarajulu*, A.I.R. 1964 Mad. 219.

months later, without legal advice, he signed a further agreement with the wife, not under seal, and without any expressed consideration, amending the original agreement by the insertion after the words "monthly sum" of the words "which after deduction of income tax shall amount to the clear sum of £ 30 each month", and declaring that the original agreement "was and always has been interpreted by the parties hereto as if the said amendment had been originally in the said agreement when the same was first executed." It was found that the original agreement did not carry out the parties' intention. *Held*, the second agreement was a valid and enforceable agreement since it was executed for a consideration in that it represented a compromise of the wife's possible action for rectification of the original agreement, an action in which she would have had some prospect of success.¹ Where the licence of an ante-1869 beerhouse is refused subject to compensation, a lease of the premises does not thereby determine as for a failure of consideration.²

In *Savage v. Uwechia*, [1961] 1 W.L.R. 455 P.C. (a case from Nigeria), a testator who died in September, 1954, and of whose will the appellants were the trustees, had executed in August, 1954, a document headed "Promissory Note" which stated: "I promise to pay the respondent or order three months after date the sum of £ 780 for value received or in default to convey to him (specified property) to hold the same unto the said (respondent) or order in fee simple". The £ 780 not having been paid, the respondent, alleging an agreement to convey the property, sought specific performance. The respondent gave no evidence as to the circumstances in which the agreement was reached and relied solely on a copy of the document. *Held*, that on the true construction of the document there was no contract for the sale of land at an ascertained or ascertainable price; that the relationship of vendor and purchaser was never established between the respondent and the deceased, and that accordingly specific performance could not be ordered. There was nothing in the words "for value received" to show what the consideration was; moreover, value received, if referring to a past consideration, would be insufficient to support a contract for the sale of land.

THE ENGLISH LAW REVISION COMMITTEE, REPORT, 1937

Recommendations on consideration.—"That an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by reliable consideration, past or present."

According to this recommendation, when implemented, no consideration should be required to make a written promise enforceable. In case of oral bargains alone consideration must be present as now under the English common law. Even when the above recommendation is implemented, it will

1. *Horton v. Horton*, [1960] 3 All E. R. 649.

2. *Grimsdick v. Sweetman*, [1909] 2 K.B. 740.

still be necessary for the court to find that the parties intended to create a binding obligation. Otherwise, merely a promise in writing will not be in law sufficient to constitute a binding agreement against the promisor, even though the question of consideration might be dispensed with. In the absence of the parties intending to incur a legal obligation a mere desire on the part of the one to help the other, though expressed in writing, will not persuade the court to hold that a binding agreement had resulted. Where a man in the form of correspondence promises to help a student, without intending to undertake any legal obligation thereby, it will be but legitimate for a court of law to conclude that the promisor by such correspondence has not undertaken any legal obligation, and that, at best, he is only ethically bound to help the student and even that if his financial condition remained as before or some onerous legal obligation was not unexpectedly fastened upon him from some other quarters.

Under the existing English common law, a mere serious promise even though in writing is not binding if it is not reciprocated by a sufficient consideration. Only a contract under seal is binding even without the foundation of a sufficient consideration.

The English Law Revision Committee, Report, 1937, also recommends:

"That an agreement to accept a lesser sum in discharge of an enforceable obligation to pay a larger sum shall be deemed to have been made for valuable consideration, but if the new agreement is not performed then the original obligation shall revive."

"That an agreement in which one party makes a promise in consideration of the other party doing or promising to do something which he is already bound to do, by law or by a contract made either by the other party or with a third party, shall be deemed to have been made for valuable consideration."

"That an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be *unenforceable* by reason of the absence of consideration."

"That a promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon performance of the act, unless the promise includes expressly or by implication a term that it can be revoked before the act has been completed."

"That a promise shall be enforceable by the promisee though the consideration is given by or to a third party."

"That a promise, which the promisor knows, or reasonably should know, will be relied on by the promisor, shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise."

"That consideration may be past as well as present."

Fifth Indian Law Commission.—The Commission recommended that exceptions should be added to Section 25 of the Indian Contract Act in terms

of the recommendations of the English Law Revision Committee, as stated above. See, further, under Section 25, *post*.

Section 2 (e) : Agreement

Aggreementum is a word compounded of two words viz. of *aggregatio* and *mentium*, so that *aggreementum est aggregatio mentium in re aliqua facta vel facienda*. And so by the contraction of these two words, and by the short pronunciation of them, they are made one word, viz. *aggreementum*, which is no other than an union, collection, copulation, and conjunction of two or more minds in anything done or to be done.

'Agreement' signifies primarily a contract, that is, a legally binding arrangement between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.¹

According to Section 2 (e) of the Indian Contract Act, 1872, every promise and every set of promises, forming the consideration for each other, is an agreement. The scope of the promise is confined to the conduct on the part of the promisor.

A conditional offer to pay a certain amount made by the management of an industry to the trade union lapses when the condition is not accepted. The question whether there was consideration for the promise made by the management arises only if the offer made had been accepted by the trade union, so as to ripen into an agreement.²

Agreement refers both to a promise and a set of promises forming the consideration for each other. Under Section 63 of the Contract Act there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.³

Agreements are of two kinds, executed or executory. An executed agreement is an agreement in which one of the parties has already performed his part, while the other party has yet to carry out his promise. In an executory contract, though the parties are *ad idem*, both have to perform their mutual promises and the fact that they have to perform their parts of the contract does not affect the validity of the contract. Thus, where a party offers to be bound by a special oath to be taken by the other party and the other party accepts the offer, there is a completed agreement between the parties even though no oath is taken. Taking of the oath is the performance of the agreement and does not affect its making.⁴

Where *A* makes a proposal to *B* that the latter should reduce his claim and *B* accepts the proposal and reduces his claim, such an acceptance is not an agreement within the meaning of Section 2(e). The compromise falls

1. *Re Symon, Public Trustee v. Symon* (1944) S.A.S.R. 102; Stroud: *Judicial Dictionary*, 3rd ed., 1952, vol. 1, 98-99.

2. *Pipraich Sugar Mills v. Mazdoor Union*, A.I.R. 1957 S.C. 95.

3. *Abaji Sitaram v. Trimbak Municipality* (1963) 28 Bom. 66.

4. *Saheb Ram v. Ram Newaz* (F.B.), A.I.R. 1952 All. 882.

properly within the terms of Section 63 which does not require any agreement.¹

Promise creates a legal obligation requiring on one side to perform the promise and on the other to accept performance of it. A promise against a promise is a good consideration. Reciprocal promises forming the consideration or part of the consideration for each other similarly entail legal obligations. Where the agreement consists of mutual promises there is an obligation on each party to perform his own promise and to accept performance of the other's promise. All agreements are not enforceable. An agreement not enforceable by law is said to be a void agreement. An agreement enforceable by law is a contract.

For void agreements *see* under Section 2 (g) and (j), and Sections 20, 23-30; for voidable contract, *see* Section 2 (i), and Sections 19 and 19 A. For 'contract' *see* under Section 2 (h) and Section 10.

Section 2 (f) : Reciprocal Promises

Promises which form the consideration or part of the consideration for each other are called reciprocal promises. A promise against a promise is a good consideration. Where the contract consists of mutual promises there is an obligation on each party to perform his own promise and to accept performance of the other's promise.

In the case of mutual or reciprocal promises, a plaintiff can sue on the defendant's promise even before he has himself fulfilled his own. If the plaintiff satisfied the court that he was ready to fulfil his own promise the constituent of consideration was there. A promise against a promise being a good consideration the other party also could sue the plaintiff in the same circumstances.²

Section 2 (g) : Void Agreement

An agreement not enforceable by law is said to be void. The agreement which is completely devoid of legal effect is also called void. In this second sense, no rights or obligations are created by a void contract. But the expression 'void' has been used in the Indian Contract Act, Section 2 (g), in a wider sense. Under Section 2 (g), a void contract means an unenforceable contract. Contracts unsupported by consideration, certain contracts made by infants, wagers, contracts based upon a fundamental mistake of fact, as well as *ultra vires* contracts are called void inasmuch as they are not enforceable. All of these unenforceable contracts are not however destitute of legal effect. 'Void' is thus distinguished from 'illegal'. An agreement to commit a robbery is destitute of all legal effect. An unreasonable agreement in restraint of trade under the common law of England is only unenforce-

1. *Sabaldas v. Sobhokhan* A.I.R. 1948 Sind 91; *Channamal v. Mool Chand* 9 Lah. 510; 108 I.C. 678; A.I.R. 1928 P.C. 99; 55 I.A. 154; *Venkataswami v. Panchakshara* (1947) 1 M.L.J. 226; A.I.R. 1947 Mad. 414.

2. *Wichel v. Johns* (1599), Cro. Eliz. 703; 78 E.R. 938, at 939.

able. In this last mentioned contract some of the terms may even stand if the unenforceable portion can be severed from the portion that is enforceable as not being opposed to public policy.¹ For the Indian law governing agreements in restraint of trade see Section 27, *post*.

Some agreements though not unlawful are void as being *ultra vires*. An agreement of a corporation or incorporated company which is not within the scope of, nor ordinarily incidental to, the objects specified by the charter, statute, memorandum of association, or other instrument of incorporation, is void, even if it is assented to or ratified by every member of the corporation or company.²

An agreement which is not in the form prescribed by Section 175 (3) of the Government of India Act, 1935, is unenforceable in law with the necessary consequences that under the provisions of Section 2 (g) of the Contract Act it is also void.³ For the statutory requirements under the Constitution of India, see under Section 11, *post*.

A contract to enter into a contract is not a valid contract.⁴

The assessee purchased Government securities and had agreed that the amount of interest on them would be paid to the Viceroy's War Purposes Fund for the duration of the war. The agreement was not legally enforceable, and the amount of interest paid by the assessee to the Fund was therefore taxable in his hands.⁵

When there is a disability as regards an alienation by way of gift in the case of a coparcener, much more so is the disability in the case of a managing member, because the managing member holds a representative capacity. If an individual member, that is, a coparcener cannot make a valid gift in respect of his undivided interest in the coparcenary property, a managing member would not be able to make a valid gift in respect of the family property. However, a manager of a joint Hindu family may make a gift of a small portion of the family property. In three cases only the gift of a portion of the family property will be valid, that is, during the season of distress, for the sake of the family, and especially for pious purposes. If the deed of gift is invalid, it makes no difference whether the challenge proceeds from a member of the family or from a stranger.⁶

If the terms of an agreement are so vague or indefinite that the intention of the parties cannot be ascertained with reasonable certainty, there is no enforceable agreement, unless the uncertain part of the agreement can be

1. *Bennett v. Bennett*, [1952] 1 K.B. 249; [1952] 1 All E.R. 413.

2. *Brougham v. Dwyer*, (1913), 108 L.T. 504; *Sinclair v. Brougham*, [1914] A.C. 398 H.L.

3. *New Churulia Coal Co., Ltd. v. Union of India*, A.I.R. 1956 Cal. 138.

4. *Jyoti Brothers v. Shree Durga Mining Co.*, A.I.R. 1956 Cal. 280.

5. *Commissioner of Income Tax, B. and O. v. Kameshwar*, A.I.R. 1953 Patna 231.

6. *Tatoba v. Tarabai*, A.I.R. 1957 Bom. 280; *Kalu v. Barsu*, 19 Bom 803. (*Sitaram v. Khandu*, 45 Bom. 105; A.I.R. 1921 Bom. 413 held not correct.)

separated from the substantial part thereof. A distinction must be drawn between a term which has yet to be agreed between the parties and a term which is part of a concluded contract but which in fact is meaningless or so ambiguous that no definite meaning can be given to it. In the former case no contract has yet come into existence; in the latter the term may be ignored, leaving the contract as a whole intact.¹ A void contract has no contractual effect, but the facts may, if it is an illegal contract, give rise to penal consequences. Unless a contract is penalised by statute, the parties to an illegal contract are not liable to punishment.²

For void agreement see Sections 23-30, *post*.

Section 2 (h) : Contract

A contract is a deliberate engagement between competent parties, upon a legal consideration, to do or to abstain from doing some act.³ It is an agreement between competent parties, to do or abstain from doing some act. According to Section 2 (h) of the Indian Contract Act, a contract is an agreement enforceable by law. The enforceability of an agreement depends on various factors. A number of Sections of the Indian Contract Act govern the aspect of enforceability of an agreement.

Every contract is founded upon the mutual agreement of the parties; the other essentials are legality, capacity (depending on age, mental ability, etc.), a mutual identity of consent (*consensus ad idem*), and form. When an agreement is stated either verbally or in writing, it is usually called an express contract; when the agreement is a matter of inference and deduction it is called an implied contract.

Contracts are classified in English text-books in various ways.⁴

As to their form, they are divided into (1) contracts of record, *e.g.*, a recognizance; (2) contracts under seal, otherwise called 'specialty contracts'; (3) simple contracts, which may be either in writing or by parol, or may arise by implication of law from the acts of the parties. All simple contracts require a consideration to support them.

Contracts are also distinguished into executed and executory: executed, where nothing remains to be done by either party, and where the transaction is completed at the moment that the arrangement is made; as where an article is sold and delivered, and payment for it is made on the spot. A contract is also said to be executed when one of the parties has wholly performed his part but the other has not so done. A contract is called executory where some future act is to be done; as where an agreement is made to build a house in six months, or to do an act on or before some future day,

1. *Nicolene, Ltd. v. Simmonds*, [1953] 1 Q.B. 543 C.A. : [1953] 1 All E.R. 822; *Jai Gobind v. Bagal*, A.I.R. 1950 Patna 445; *Scammell (G.) and Nephew, Ltd. v. H. C. and J. G. Ouston*, [1941] A.C. 251 : 110 L.J. K.B. 197.

2. *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781.

3. *Wilson v. Bury*, 5 Q.B.D. 518.

4. *Wharton : Law Lexicon*, 14th ed., 1953, 248.

or to lend money upon a certain interest payable at a future time. An executory contract is thus one wherein something is yet to be done under it by both the parties.

Contracts are, again, classified into entire and severable : an entire contract is one the consideration of which is entire on both sides. The entire fulfilment of the promise by either is a condition to the fulfilment of any part of the promise by the other. Whenever, therefore, there is a contract to pay a gross sum for a certain and definite consideration, the contract is entire. 'If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe, and ask you to pay one half the price.'

A severable contract, on the other hand, is one the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side, as a contract to pay a person the worth of his services so long as he will do certain work; or to give a certain price for every bushel of so much corn as corresponds to a sample.

When the party to whom an engagement is made makes no express agreement on his part, the contract is called unilateral even in cases where the civil law attached certain obligations to his acceptance. A loan of money and a loan for use were of this kind.¹

A contract is an agreement made between two or more persons and is constituted by the acceptance of one party of a proposal made to him by the other party to do or to abstain from doing some act. Thus there must be at least two parties to a contract in the respective position of promisor and promisee. In the eye of the law, the same person cannot be both promisor and promisee in relation to one and the same transaction. There can be no partnership between the same individual acting on the one hand as the guardian of the minor and on the other as a partner in his or her individual capacity.² Similarly, a partner cannot be an employee of the firm. Since a contract can only be bilateral and the same party cannot be a party on both sides, there can hardly be a contract between *A* on the one side and *A* and *B* on the other, particularly a contract of employment.³ There may however be circumstances justifying the Court to hold a different view. Thus, where an agreement is made between *A* on the one side and *A* himself and another person or other persons on the other, the Court may reasonably take the view as if it was made between *A* and that other person or those other persons only.⁴ In *Rye v. Rye*, [1962] 2 W.L.R. 361 H.L., it has been

1. Wharton : *Law Lexicon*, 14th ed., 1953, 1025.

2. *Meenakshi v. Subramanian*, A.I.R. 1957 Mad. 8.

3. *Magnus v. Commissioner of Income-Tax*, A.I.R. 1958 Bom. 467.

4. *Bonsor v. Musicians' Union*, [1954] 1 All E.R. 822 C.A.

said that Section 73 (3) of the English Law of Property Act, 1925, does not enable a person to grant himself a lease of land of which he is the owner. Lord Radcliffe said that nothing in the said Act made it possible for a man to enforce contractual obligations against himself. He however did not feel sure that the same result would necessarily be reached in the case of two persons seeking to demise to themselves by deed, for Section 72 (3) of the Act would be able to pass a legal interest by demise and it might be possible to express the required contractual obligations in the form of joint and several covenants, so that each single person covenanted separately with himself and the other.

The parties to an agreement must be definite persons ascertained and existing at the time when it is made. The parties however need not be known to each other at the time when the agreement is made. It is not necessary to utter the actual name unless the personality is an essential part of the contract.¹

Voluntary covenants of a unilateral character do not themselves render a deed a deed of contract.²

An offer, to be capable of acceptance, must involve a definite promise by the offeror that he will bind himself if the exact terms specified by him are accepted.³ There can be no contract unless the parties have so expressed themselves that their meaning can be ascertained with reasonable certainty. Although the Court will not be astute to find lack of certainty, it cannot infer the existence of an agreement from vague and indefinite language. Where, however, there is evidence that the parties have acted upon the faith of a written document, the Court will prefer to assume, especially in a commercial transaction conducted against the background of special and familiar usage, that the document embodies a definite intention to be bound.⁴

Section 92 of the Indian Evidence Act, 1872, excludes oral evidence to vary the terms of the written contract. It has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. Section 91 also excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter. There is nothing in either of the said Sections to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract.⁵

1. *Gostho Behari v. Surs' Estates, Ltd.*, A.I.R. 1960 Cal. 752.

2. *Provat Kumar v. Commissioner of Income Tax*, A.I.R. 1959 Cal. 484.

3. *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256.

4. *Scanimell (G.) and Nephew, Ltd. v. Outson* [1941] A.C. 251; 110 L.J. K.B. 197.

5. *Tyagaraja v. Vedathanni*, A.I.R. 1936 P.C. 70; *Pym v. Campbell*, (1856) 6 E. & B. 370; 25 L.J. Q.B. 277; *Mottayappan v. Palani Goundan*, 38 Mad. 226; 25 M.L.J. 290; 20 I.C. 924; A.I.R. 1915 Mad. 855; *Pertab Chunder v. Mohendra*, 17 Cal. 291; 16 I.A. 233.

Where a compromise petition stated : "The following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land", it was held that the terms of this clause were so vague that it could not amount to an enforceable agreement.¹ An order for a new motor van stipulated : "...this order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years". The clause as to hire-purchase terms was so vague that no precise meaning could be attributed to it, and, consequently, there was no enforceable contract between the parties.²

A contract to enter into a contract is not a valid contract.³

Whether a concluded contract has been made or not is a question of fact to be determined in each case by a consideration of all the relevant circumstances and facts and cannot be concluded by the parties' or the solicitors' description of the situation either as a contract or negotiation.⁴ Where parties acted to the knowledge of the proposer, upon the footing of a proposal made, the objection that the contract itself was inchoate or incomplete could not be maintained. After such actings *locus poenitentiae* or the power of resiling from an incomplete engagement or unaccepted offer is barred by *rei interventie* which raises a personal exception which excludes the plea of *locus poenitentiae*.⁵

Construction of contract.—The test for determining whether there was a binding contract between the parties is whether the parties are of one mind on all material terms of the contract at the time it is said to have been finalised between them and whether they intended that the matter was closed and concluded between them.⁶ The completion of an agreement is a matter of fact.⁷ The terms, conditions, and the nature of a contract have to be ascertained from all the facts and circumstances of the case.⁸ Where the essential terms of a bargain are agreed upon between the parties which however it is intended to incorporate in a formal document to be later executed, the contract is a concluded one, even though no formal document has been executed. But where it is a condition of the bargain itself that the agreement made between the parties is to be subject to a document being further drawn up, agreed to, and executed by the parties, there is no concluded

1. *Jai Gobind v. Bangal*, A.I.R. 1950 Patna 445.

2. *Scammell (G.) and Nephew, Ltd. v. Outson* [1941] A.C. 251 : 110 L.J. K.B. 197 ; see S. 29, *Post*.

3. *Jyoti Brothers v. Shree Durga Mining Co.* A.I.R. 1956 Cal. 280.

4. *Gostho Behari v. Surs' Estates, Ltd.*, A.I.R. 1960 Cal 752.

5. *Venkayamma v. Appa Rao* A.I.R. 1916 P.C. 9.

6. *Hyam v. Gubbay* (F.B.), A.I.R. 1916 Cal. 1 ; *Bajinath v. Kshetrahari*, A.I.R. 1955 Cal. 210 ; *Radha Kishan v. Shankar Das* A.I.R. 1927 Lah. 252.

7. *Harihar Prasad v. Kesho Prasad* A.I.R. 1925 Patna 68.

8. *Ka Ron Lanong v. State of Assam*, A.I.R. 1959 Assam 75. *Shiv Dayal v. Union of India* A.I.R. 1963 Punj. 538.

contract until the final agreement is executed.¹ A contract in writing in India does not necessarily imply that the document must be signed by both the parties thereto.²

In the construction of a written or printed document the intention of the parties is gathered as expressed by the words used. Where the language is imperfect and it is not impossible to know what the intention was, the circumstances with reference to which the words were used should also be looked into.

A contract must be construed as a whole and the intent of the parties must be ascertained from the document as a whole.³ A contract which is intended to be binding may be enforceable even though certain terms have not been precisely agreed, if the nature of the terms can be ascertained by implication. One cannot add to a contract an implied term inconsistent with or which contradicts the express terms of the contract.⁴

The word 'implied' is applied to contracts implied by law as well as to contracts that may be called tacit contracts. A tacit contract is one where the proposal or the acceptance or both are signified not by words but by acts or conduct. Before there can be such a tacit or implied contract, the acts or the conduct relied upon must be of such a nature that they can only give rise to the inference that there must have been an implied offer and acceptance. If the acts or conduct are capable of being consistent with there being no offer or no acceptance, no tacit or implied contract can arise from such acts or such conduct.⁵

The Court ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.⁶ Thus the doctrine can only be invoked to give business efficacy to the transaction as must have been intended. Where an obligation is not clearly intended as such, and must fail to take effect unless some obvious oversight is remedied, the doctrine may be properly applied.

1. *Sitlani v. Viroosing*, A.I.R. 1947 Sind 6; *New Mofussil Co., Ltd. v. Shankerlal*, (1941) Bom. 361; 43 Bom. L.R. 293; 196 I.C. 146; A.I.R. 1941 Bom. 247, see on appeal *Shankerlal v. New Mofussil Co.*, A.I.R. 1946 P.C. 97; 224 I.C. 598; *Shreedhar Mahadev v. Shasheebhushan* (1933) 60 Cal. 111; *Currimbhoy & Co. Ltd. v. L. A. Greet* (1930) 57 Cal. 170; *Bijoya Kanta v. Kailash Chandra* (1919) 46 Cal. 771. *Harda Municipality v. Harda Electric Supply Co.* A.I.R. 1964 M.P. 101.

2. *Bouwang Raja v. Banga Behari* (1915-16) 20 G.W.N. 408.

3. *Soundararajan & Co., Ltd. v. Annamalai* A.I.R. 1960 Mad. 480.

4. *Gulabchand v. Kudilal* (F.B.), A.I.R. 1959 M.P. 151.

5. *Umedsinh v. Marsden Mills*, A.I.R. 1959 Bom. 143.

6. *Pragdas v. Jeevanlal*, A.I.R. 1948 P.C. 217; *Navnittal & Co. v. Kishanchand & Co.*, A.I.R. 1956 Bom. 151.

A term may also be implied where it is so obvious that it goes without saying.¹ As to further discussion on implied terms and implied promises, see under *Implied terms*, *infra*, and Section 9, *post*.

The normal course of business is to pay the earnest money when the contract is concluded. The receipt of an earnest money leads to the inference that the contract was concluded.²

When the existence of a contract is to be found out from correspondence, the rule is that the entire bunch of correspondence that passed between the parties has to be looked into for determining whether there was a concluded contract. The rule has however no application in a case in which the contract has to be evidenced by a formal document in compliance with the provisions of common law or of a statute.³

The inclination of a Court is in favour of validating rather than avoiding a contract, and when a law makes a contract void, the Court will strictly construe the provisions of that law.⁴ The terms of a document have to be read as a whole. Where, therefore, the terms of a settlement are not separable and some of them which are the basic terms are found to be illegal, the settlement will be set aside as a whole. To set them aside partially will be to spell out a new agreement which would not be the agreement of the parties.⁵

A contract may be either express or implied. An express contract can be proved by written or spoken words which constitute an agreement between the parties; an implied contract, on the other hand, may be proved by circumstantial evidence of an agreement. A contract may also be of a mixed character, that is, partly expressed in words and partly implied from acts of the parties and circumstances.⁶

If one party puts forward a printed form of words for signature by the other and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, then the Court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved. Printed forms are not to be made a trap for the unwary, and this is so, even though words are typed and not printed. Where the terms in print intend something different from the manuscript, the intention expressed in the manuscript should prevail.⁷

1. *Delhi Cloth and General Mills v. Kapur*, A.I.R. 1958 Punjab 93.

2. *Vishwanath v. Amaral*, A.I.R. 1957 M.B. 190.

3. *Damodar v. Union of India*, A.I.R. 1959 Cal. 526; *Chatturbhuj v. Moreshwar*, [1954] S.C.R. 817; A.I.R. 1954 S.C. 236.

4. *Jethalal v. Kapur*, A.I.R. 1956 Bom. 74.

5. *Shri Mahadeo Jew v. Balkrishna Vyas*, A.I.R. 1952 Cal. 763.

6. *Gulab Singh v. Punjab Zamindara Bank, Ltd.*, A.I.R. 1942 Lah. 47.

7. *China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd.*, A.I.R. 1961 S.C. 1295.

Where printed or typed forms are used and are modified or amplified by written words or figures, the latter are dominant, and the printed or typed matter that is inconsistent with the written words can be rejected.¹ This principle is applied in shipping cases.² It is not however confined to bills of lading and can thus apply to a receipt form typed on a cheque enclosed with ordinary commercial correspondence.³ Thus, if the printed terms of a contract are inconsistent with what has been written or typed in, the latter will prevail.⁴ There can however be no hard and fast rule as to this aspect of the construction of a contract. The efforts of the Court will be to discover the real contract of the parties from the printed as well as from the written words. Thus even in the case of an inconsistency between the printed and written provisions of a contract, the print cannot always be discarded.⁵

The subsequent conduct of a party is irrelevant for the purpose of construing the agreement : the construction must depend on the intention of the parties when it was made, which is to be ascertained from its terms, read in the light of the facts known to both parties when it was concluded.⁶ A contract when made will not be affected by subsequent abortive negotiations, if any.⁷

The nature of a transaction is to be gathered from what has passed prior to the contract the construction of which cannot be affected in contemplation of equity by what took place after it has once been entered into.⁸ Where a party to a contract demands that the other party should fulfil a new condition, namely, execute a security bond along with the sale deed, which condition was not provided for in the agreement of sale, the new condition is unjust and amounts to a repudiation of the agreement of sale.⁹

Vendee's insistence on the form of warranty to be inserted in the sale-deed subsequent to the contract for sale cannot affect the contract. It might in a given case disentitle him to specific performance. But that would depend upon whether his proposal regarding a form of warranty to which

1. *Neuchatel Asphalte Co., Ltd. v. Barnett*, [1957] 1 All E.R. 362 C.A.

2. *Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama*, [1956] 1 All E.R. 209 C.A. affirmed [1956] 3 All E.R. 957 H.L.

3. *Neuchatel Asphalte Co., Ltd. v. Barnett*, [1957] 1 All E.R. 362 C.A.

4. *Ratilal v. Dalmia Cement and Paper Marketing Co. Ltd.*, A.I.R. 1943 Bom. 229 ; *Moolchand Kesarimull v. Associated Agencies*, A.I.R. 1942 Mad. 139 : (1941) 2 M.L.J. 281 ; *Noorbhai v. Allahbux & Co.*, A.I.R. 1917 Bom. 246 : 42 I.C. 820 : 19 Bom. L.R. 845 ; *Glynn v. Margeson*, [1893] A.C. 351, 357 ; *Hart v. Standard Marine Insurance Co.*, (1889) 22 Q.B.D. 499, 501 ; *Robertson v. French*, (1803) 4 East, 130 : 7 R.R. 538, 540.

5. *Paul Beier v. Chotalal Javerdas*, (1906) 30 Bom. 1 ; *Gumm v. Tyrie*, (1864) 33 L.J. (Q.B.) 97, 111.

6. *Florrie Edridge v. Rustomji Danjibhoy*, A.I.R. 1933 P.C. 233.

7. *Davies v. Sweet*, [1962] 2 W.L.R. 525 C.A. ; *Radha Kishan v. Shankar Das*, A.I.R. 1927 Lah. 252.

8. *Surinder v. Ripudaman*, A.I.R. 1955 N. U.C. (Funj.) 3429 ; *Laxmi Ginning & Oil Mills v. Amrit Banaspati*, A.I.R. 1962 Punj. 56.

9. *Khuda-I-Tala v. Hamida*, A.I.R. 1945 All. 70.

he was not entitled was a mere proposal regarding the form of the sale or was a refusal to perform without it.¹

The rule of construction that a grant made to a man for an indefinite term ensures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey.²

Whether money advanced by a merchant is to be considered as a loan to be reimbursed by the owner or as part payment of the freight not dependent upon the determination of the voyage must depend upon the terms of the written instrument, upon the construction of which the question arises.³

Where the question is what exactly were the terms and conditions of the contract of carriage by sea in a particular case, reference to other bills of lading issued by the shipping company in connection with the same voyage cannot be made.⁴

When a contract of sale of goods has been embodied in a written deed, the previous offers and acceptances lose all importance and the only contract between the parties is the written contract. The previous offers and acceptances are merely stages in the negotiations between the parties.⁵

Where in the case of a contract there exists an apparent inconsistency according to the literal construction of the words used, and if by any other reasonably possible construction the apparent inconsistencies can be reconciled, that construction should be adopted. Consequently, where of the two portions of a clause which disclose the inconsistency, one is susceptible of a possible construction different from its literal meaning, while the other is not: and if by applying the possible construction all inconsistency disappears, that construction must be adopted. The Court will not however speculate as to the reasons which may have dictated the employment of the language used in the contract.⁶

In cases of contract when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein or without leading to strange and absurd results, it is left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience.⁷

An oral contract is valid and enforceable; but in such a case it is a

1. *Durga Prasad v. Deep Chand*, A.I.R. 1954 S.C. 75; *Bindeshri Prasad v. Jairam Gir*, (1887) 9 All. 705.

2. *Lekhraj v. Kunhya*, (1878) 3 Cal. 210 P.C.

3. *P.C. Ray & Co. v. A.C. Mukherjee*, A.I.R. 1959 Cal. 131; *Allison v. Bristol Marine Insurance Co.*, (1876) 1 A.C. 209.

4. *Muhammadi Steamship Co. v. Keserishih Valladas*, A.I.R. 1957 Trav.-Co. 133.

5. *Ralli Brothers, Ltd. v. Bhagwandas*, A.I.R. 1945 Lah. 35.

6. *Raneegunge Coal Association, Ltd. v. Tata Iron & Steel Co. Ltd.*, A.I.R. 1940 P.C. 151.

7. *Naresh Chandra v. Ram Chandra*, A.I.R. 1952 Cal 93. See also *English law in India, ante*.

question of construction whether the execution of the further written contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.¹

While construing a written contract, the Court will be erring in approaching the question of what formed the subject-matter of the negotiations which preceded the written contract between the parties, without first settling to what extent the contract was so ambiguous as to justify resort to evidence as to the negotiations.²

If any documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the contract is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the formal document may be ignored.³ The conduct of the parties in acting upon the contract before the formal agreement was drawn up is an evidence of this fact. Where the parties had entered upon their duties in pursuance of a contract the execution of a formal document is not necessary for the completion of the contract.⁴

Negotiations opened between the parties for the sale of certain property. Some of the terms of sale were settled between the parties and the vendor afterwards sent the vendee to his solicitor for settling other terms, receiving the earnest money and drawing up a draft agreement and an engrossment on that draft. The further terms were settled, the earnest money was received by the solicitor and a rough draft of agreement was prepared. The agreement was engrossed in due course, but before it could be signed by the vendee, the vendor declined to proceed in the matter. In the circumstances it was held that the agreement arrived at between the parties at the first

1. *Shankorial v. New Mofussil Co. Ltd.*, A.I.R. 1946 P.C. 97; *Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; 81 L.J. Ch. 184; 105 L.T. 434; *Copen v. Sutherland*, (1890) 17 Cal. 919.

2. *Joseph Darmanin v. Carmel Micallef*, A.I.R. 1946 P.C. 50.

3. *Currimbhoy & Co. v. Creel & Ors.*, A.I.R. 1933 P.C. 29; 60 Cal. 980; 141 I.C. 209; 60 I.A. 297; *Devi Prasad v. Secretary of State*, A.I.R. 1941 All. 377; *Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284; 81 L.J. Ch. 184; 105 L.T. 434; *Harichand v. Govind Luxman*, (1923) 47 Bom. 335 P.C.; A.I.R. 1923 P.C. 47; *Sreegopal Mullick v. Ram Churn*, (1882) 8 Cal. 856; *Subimalchandra v. Radhanath*, A.I.R. 1934 Cal. 235; *Gostho Behari v. Surs' Estates, Ltd.*, A.I.R. 1960 Cal. 752; *Rossiter v. Miller*, (1878) 3 A.C. 1124, 1143.

4. *Gujjar Mat v. G.G. of India*, A.I.R. 1942 Pesh. 33; *Hukam Chand v. Ram Bahadur*, 3 Pat. 625; A.I.R. 1924 P.C. 156; 80 I.C. 841; 51 I.A. 208; *Mohammed Musa v. Ahore Kumar*, 42 Cal. 801; A.I.R. 1914 P.C. 27; 28 I.C. 930; 42 I.A. 1; *Amritlal v. Harkishandas*, A.I.R. 1946 Bom. 149.

interview only contemplated execution of the engrossed draft in solicitor's office and was not a concluded agreement between the parties which could be enforced.¹

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.² Thus documents may upon their true construction constitute a binding contract for the sale and purchase of immovable property, enforceable by specific performance, although they stipulate for a contract to be prepared by a Vakil, and that stipulation, together with others, is described in the documents as a condition.³ Whether execution of further contract is a condition or a mere expression of desire is a question of construction.⁴ A mere reference to the preparation of a formal document does not prevent a contract otherwise binding being complete. Equity holds people bound by a contract, which, though deficient in some requirements as to form, is nevertheless an existing contract.⁵

If in the case of proposed sale or lease of an estate two persons agree to all the terms and say : "We will have the terms put into form," then all the terms being put into writing and agreed to, there is a contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled. Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says ; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form or whether they should be subject to a new agreement the terms of which are not expressed in detail.⁶

1. *New Mofussil Co. Ltd. v. Shankerlal*, (1941) Bom. 361 : 43 Bom. L.R. 293 : A.I.R. 1941 Bom. 247 : 196 I. C. 146, on appeal *Shankerlal v. New Mofussil Co. Ltd.*, A.I.R. 1946 P.C. 97, for which see *supra* ; *Rosdale v. Denny*, [1921] 1 Ch. 57 : 90 L.J. Ch. 204 : 124 L.T. 294 : 37 T.L.R. 45 ; *Sitlani v. Viroosing*, A.I.R. 1947 Sind 6.

2. *Harichand v. Govind Luxman*, (1923) 47 Bom. 335 P.C. : A.I.R. 1923 P.C. 47 : 71 I.C. 763 : 50 I.A. 25 ; *Ridgway v. Wharton*, 6 H.L. Cas. 238, 263.

3. *Harichand v. Govind Luxman*, (1923) 47 Bom. 335 P.C. : A.I.R. 1923 P.C. 47 : 71 I.C. 763 : 50 I.A. 25 ; *Branco v. Cobarro*, [1947] 1 K.B. 854.

4. *Currimbhoy & Co. Ltd. v. Creet & Ors.*, A.I.R. 1933 P.C. 29.

5. *Subimalchandra v. Radhanath*, A.I.R. 1934 Cal. 235.

6. *Winn v. Bull*, (1877) 7 Ch. D. 29 : 47 L.J. Ch. 139 : 26 W.R. 230.

Purchasers made an offer by letter to a vendor to purchase his freehold property at a specified sum "subject to title and contract". Negotiations followed, and the purchasers alleged that all the material terms were subsequently agreed to between the parties at an interview and by letters, and were embodied by the purchasers in a draft contract which the vendor returned unaltered with the words: "it seems to be all in order." The vendor having refused to complete, the purchasers brought an action for specific performance of the contract contained in the draft. It was held that even assuming that all the terms of the agreement had been contained, settled one by one and embodied in the draft, the condition in the offer required that a written agreement made inter partes should be formally entered into, and in the absence of such a document there was no enforceable contract.¹

There was an agreement to purchase land "subject to a proper contract to be prepared by the vendor's solicitors". A proper contract was subsequently prepared by the vendor's solicitors, approved by the purchasers as well as executed by the vendor and tendered to the purchasers for execution. The purchasers refused to sign. It was held that not only there was no contract but that the purchasers were entitled to recover the deposit.²

An agreement "subject to suitable agreements being arranged by solicitors" is in the same category as agreements "subject to contract", "subject to formal contract," and "subject to proper contract".³

Where the completion of the contract was subject to the approval of the purchaser's solicitors, and the solicitors disapproved of the title, the contract could be rescinded by the purchaser.⁴ When a vendor of immovable property desires to enforce a contract for sale with a condition that the title adduced should be to the satisfaction of the purchaser's solicitors, he must prove either that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it.⁵

As to further discussion on construction of contracts, see heads: *Intention to create legal relations, Contents of contract, Terms of contract, Import of express terms, Implied terms of contract, Condition and warranty, Limiting and excluding clauses, Unreasonable clauses in an agreement, infra.*

Intention to create legal relations.—An offer, to be capable of acceptance, must involve a definite promise by the offerer that he will bind himself if the exact terms specified by him are accepted.⁶ There can be no contract unless the parties have so expressed themselves that their meaning

1. *Coope v. Ridout*, [1921] 1 Ch. 291 : 90 L.J. Ch. 61 : 124 L.T. 402.

2. *Chillingworth v. Esche*, [1924] 1 Ch. 97 : 93 L.J. Ch. 129 : 129 L.T. 808 : 40 T. L.R., 23.

3. *Lockett v. Norman Wright*, [1925] 1 Ch. 56 : 94 L.J. Ch. 123 : 132 L.T. 532.

4. *Sreegopal Mullick v. Ram Churn*, (1882) 8 Cal. 856.

5. *Treacher & Co. Ltd. v. Mahomedally*, (1911) 35 Bom. 110 ; *Clack v. Wood*, (1882) 9 Q.B.D. 276.

6. *Cartill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256.

can be determined with reasonable certainty. Although the Court will not be astute to find lack of certainty, it cannot infer the existence of an agreement from vague and indefinite language. Where, however, there is evidence that the parties have acted upon the faith of a written document, the Court will prefer to assume, especially in a commercial transaction conducted against the background of special and familiar usage, that the document embodies a definite intention to be bound.¹ Section 92 of the Indian Evidence Act, 1872, excludes oral evidence to vary the terms of the written contract. It has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. Section 91 also excludes oral evidence as to the terms of a written contract. Oral evidence is admissible therefore to show that a document executed by a person was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating evidence about some other matter. There is nothing in either of the said two Sections to exclude oral evidence in such a case to show that there was no agreement between the parties and therefore no contract.² Thus where *R* offers a reward of a golden necklace of a given quality and weight to anyone who will give him the whereabouts of *S* who is not traceable, the supply of the necessary information to *R* by *H* with the knowledge of the offer will not result in a binding agreement between *R* and *H* if *H* had done the work without any intention to create a legal relation between himself and *R*. That is to say, even though the supply of the information by *H* with the knowledge of the offer would be ordinarily treated, in the eye of the law, as the acceptance of the offer as well as the execution of the consideration on the part of *H*, the absence of the intention on the part of *H* to create any legal relation between himself and *R* would have resulted in the creation of no contract, that is, an agreement enforceable in law.

Under the English common law, apart from exceptional cases, consideration is a *sine qua non* for the formation and enforceability of a binding agreement.³ The aspect of consideration ordinarily embodies the aspect of the seriousness of the parties to the agreement in the matter of the creation of legal consequences ensuing from such an agreement. Social engagements, as distinct from commercial and legal, are presumed to be, in law, lacking in the contemplation of the creation of legal consequences as between person and person. To take an example. "Please, come to my house", says *P* to *D*, "and we shall go out for a walk together". *D* came to the house of *P*, but *P* could not leave the house because of a more important engagement now appearing to his mind. *D* cannot sue *P* in damages for his not fulfilling the promise, the reason being that there had been no intention between *D*

1. *Scammell (G.) and Nephew, Ltd. v. Ouston*, [1941] A.C. 251.

2. *Tyagaraja v. Vedathanni*, A.I.R. 1936 P.C. 70; *Pym. v. Campbell*, (1856) 6 E. & B. 370 : 25 L.J. Q.B. 277; *Mottayappan v. Palani Goundan*, 38 Mad. 226 : 25 M.L.J. 290 : A.I.R. 1915 Mad. 855 : 20 I.C. 924; *Pertub Chunder v. Mohendra*, (1889) 17 Cal. 291 : 16 I.A. 233.

3. *Scuttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1 H.L.

and *P* to create any legal obligation by the engagement as made between them. In the circumstances, there was, in the eye of the law, no contract between them, though a consideration had moved from *D* to *P* in the former coming to the house of the latter.¹ In the words of Lord Stowell, contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever.² It is, however, sometimes difficult to distinguish a social engagement from a commercial or legal one. Suppose, for example, the said *D* and *P* agree to dine together at the Ashoka Hotel on the understanding that *P* will pay for the dinner, and on the return journey *D* will pay the taxicab fare for both. Now also suppose that *P* has performed his part of the affair, but *D* refuses to perform his. Will *D* be held liable for damages in favour of *P*? Or, will the Court treat the whole affair as a mere social engagement, and the breach that has occurred as only a deviation from a mutual understanding? A legalist may legitimately hold that when *P* performed his part of the engagement, *D* will be bound, legally speaking, to perform his. According to him, the engagement, which in its inception was a merely social one, may legitimately assume the garb of a contractual one when entering the domain of the law. Of necessity, therefore, in the absence of a clear indication to the effect that the parties in a given case did not intend to undertake any contractual, that is, legal, obligation by the engagement, the Court will judge it from the words or conduct of the parties, that is, from the facts and circumstances of the case as to whether there had been any contractual intention between them. The inference of a reasonable man, in the circumstances, will be the inference of a court of law. The facts and circumstances alone will show whether the parties in a given case intended to make a bargain which could be enforced in law. Thus in spite of an agreement having been made on the basis of a consideration no contractual or legal obligation may result therefrom when it appears to the Court that the parties did not intend that the agreement should be attended with legal consequences.³ Life is not always law, after all.

As noted before, where the parties to an engagement have expressly accepted the position that the incidents thereof will never be mooted in a court of law, the Court will not render its assistance to a party who has, in spite of the said unambiguous expression of intention, has changed his mind

1. See *Dalrymple v. Dalrymple*, (1811), 2 Hag. Con. 54, 105; *Booker v. Palmer*, [1942] 2 All E.R. 674, 676, 677 C.A.; *Cobb v. Lane*, [1952] 1 All E.R. 1199 C.A.; *Balfour v. Balfour*, [1919] 2 K.B. 571 C.A.; *Rose and Frank Co. v. Crompton*, [1925] A.C. 445, H.L.; *Jones v. Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626; *Appleson v. Littlewood*, [1939] 1 All E.R. 464, C.A.; *Coward v. Motor Insurers Bureau*, [1962] 1 All E.R. 531 C.A.

2. *Dalrymple v. Dalrymple*, (1811), 2 Hag. Con. 54, 105; 161 E.R. 665, 683 (per Sir William Scott).

3. *Simpkins v. Pays*, [1955] 3 All E.R. 10; [1955] 1 W.L.R. 975; *Balfour v. Balfour*, [1919] 2 K.B. 571; *Pearce v. Merriman*, [1904] 1 K.B. 80; *McGregor v. McGregor*, (1888) 21 Q.B.D. 424.

and chosen to go to law for his grievance.¹ It is thus possible for parties to come to an agreement by accepting a proposal though not establishing thereby any legal relation between them. The law will not choose to impose any legal obligation on them where they have chosen not to undertake any. This intention of the parties may be implied from the subject-matter of the agreement or it may also be expressed by the parties. Thus not only in social and family relations but even in business matters the parties may intend to rely on each other's good faith and honour and to exclude all idea of settling disputes through the medium of law. This exclusion of the ambit of the law does not however apply to a transaction which though originating from the original agreement can be construed as a new and independent obligation undertaken by the parties. An actual transaction when undertaken by the parties thus may give rise to the ordinary legal rights as a mere legal significance of the transaction undertaken though no party could be compelled under the original unenforceable agreement to undertake the said transaction.²

In *Coward v. Motor Insurers Bureau*, [1962] 1 All E.R. 531, 535 C.A., there was an arrangement whereby C. habitually transported a fellow-workman to their place of work on the pillion seat of his solo motor cycle. The evidence established, as a matter of inference, that there was an arrangement whereby the passenger paid C. an unascertained weekly amount for transporting him to and from work. As neither party intended this arrangement to be a legally binding contractual relationship, the obligation was only a moral, and not a legal or contractual, obligation.

An arrangement between husband and wife may be a purely domestic arrangement not intended to create legal relationships and such an arrangement gives rise to no rights in favour of either of the parties, *inter se*.³ It is open to a party to show that a document simply executed but not carried into effect is a benami and colourable document, and to recover possession of property against the party claiming under such document.⁴

The view of some jurists⁵ that the common law does not require any positive intention to create a legal obligation as an element of contract should not be found acceptable in India. According to them, a deliberate promise seriously made can be enforced irrespective of the promisor's views

1. *Appleson v. Littlewood (H.) Ltd.*, [1939] 1 All E.R. 464; *Jones v. Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626; *Rose*; and *Frank v. Crompton*, [1925] A.C. 445; *Edwards v. Skyways, Ltd.*, [1964] 1 All E.R. 494 Q.B.D.; *Booker v. Palmer*, [1942] 2 All E.R. 674, 677 C.A. (Per Lord Greene, M.R.); *Isaac v. Hotel De Paris, Ltd.*, [1960] 1 All E.R. 348, 352, (Per Lord Denning).

2. *Rose and Frank v. Crompton* [1925] A.C. 445, 455.

3. *Spellman v. Spellman* [1961] 1 W.L.R. 921 C.A.

4. *Shamlal v. Amarendra Nath* (1896) 23 Cal. 460.

5. Samuel Williston, *Selections*, 1938, s. 21; see however his *Treatise on the Law of Contracts*, 3d edn., 1957, vol. I, 37-44; Raphael Tuck, *Canadian Bar Review*, 1943, vol. xxi, 123, *Intent to Contract and Mutual Assent*.

regarding his legal liability; and to such jurists there seems no reason why merely social engagements should not create a contract if the requisites for the formation of a contract exist.

It will be submitted that the term "seriously" is vague, and moreover, the promisee may have taken a given social engagement seriously whereas the promisor may not have taken it so. In the circumstances, consistently with the majority of English precedents, it should be given to the Court to pronounce, in a case of dispute, as to whether a social engagement had reached the stage of a binding contractual obligation. To take two examples. *A* stands a party to his friend *B*, on the Christmas eve. *B* volunteers, by way of return, a similar party on the New-Year's Day. *B* however fails. No damage will lie against *B*, in favour of *A*. Indian and Pakistan embassies in London mutually agree to celebrate Independence Day by giving a party to the foreign diplomats in London, India having agreed to pay for the food and Pakistan for the drinks. India and Pakistan manage the show but India pays also for the drinks in order to accommodate Pakistan. India can recover for the bill for the drinks from Pakistan.¹

A perusal of article 21 of Samuel Williston, *A Treatise on the Law of Contracts*, 3rd ed., 1957, vol. I, pages 37-44, will show that Williston for his views was depending upon American decisions and not English. In fact, for all practical purposes, there is likely to be no conflict between the view taken by the present text and that held by Williston.

Parties to an informal transaction frequently do not think of legal obligations. The Court will however, in fit cases, fasten such obligations on the promisor even though the engagement looked *prima facie* like only a purely social engagement. To quote Williston, *op. cit.*, page 43, even where one party makes it clear to the other that he is unwilling to enter into a contract, the law may nevertheless impose one upon him where his conduct would be tortious except upon the assumption that he assented to an offer. And to cite Raphael Tuck, *Canadian Bar Review*, vol. xxi, 1943, page 124, a contract will be formed irrespective of the views of the parties regarding their legal liability even though it be the most informal transaction without a thought on either side of legal obligations.

To conclude, on the part of the present author, there is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.²

Onus.—The onus of establishing that the agreement was not intended to create legal relations is heavy on the party setting up that defence.³

1. See Cheshire and Fifoot, *Law of Contract*, 6th ed., 1964, 93-99.

2. *Booker v. Palmer* [1942] 2 All E.R. 674, 677 (*per* Lord Greene, M.R.). *Isaac v. Hotel De Paris Ltd.* [1960] 1 All E.R. 348, 352 P.C. (*per* Lord Denning). *Goward v. Motor Insurers Bureau* [1962] 1 All E.R. 531 C.A.

3. *Edwards v. Skyways, Ltd.* [1964] 1 All E.R. 494 Q.B.D.

Contents of contract.—An agreement may be made wholly by word of mouth or wholly in writing or partly by word of mouth and partly in writing.¹ A statement made by one party to the other becomes part of their contract if such is their intention as inferred from all the circumstances of the case. If no such intention can be inferred, the statement remains outside the contract and, in the absence of fraud, no action for damages will lie upon it; though it may afford grounds for equitable relief.² Where an agreement has been made wholly by word of mouth, in a case of dispute as to the scope of the agreement, the Court has to rely on the evidence adduced by the parties concerned. The statements appearing to the Court as having been made by the parties will determine the contents of an agreement as made by word of mouth. It will thus be primarily a question of evidence. Where the agreement has been made wholly in writing, the Court will interpret, according to the accepted rules of construction, the meaning of the expressions used. When an agreement has been made wholly in the form of writing or wholly in a written and more formal form, parol evidence cannot be admitted to add to, vary or contradict the terms of the agreement thus made.³ But to exclude parol evidence, the party seeking its exclusion has to prove that the agreement concerned was fully embodied in the written or written and formal form and not merely partially incorporated therein. Where an agreement has been made partly by word of mouth and partly in writing, the Court has to take evidence in order to discover the statements made as well as to construe the expressions used in writing according to the usual rules of interpretation. Where an agreement *prima facie* appears to the Court to have been fully made in writing it will require a strict proof of oral and collateral undertakings, when alleged in order to allow them to affect the import of the agreement as embodied in writing.⁴ Where the document embodies only a part of the transaction, and the nature and incidents of the transaction have to be gathered in their entirety from the expressions used in the document as well as from the statements orally made as between the parties the parol evidence of the statements orally made will be considered admissible by the Court.⁵ By such admission the Court is not allowing an agreement as embodied in writing to be altered at the pleasure of a party but only establishing and enforcing the contract in its entirety. A part of the contract is in the eye of the law not the contract sought to be entered into. Oral undertakings while forming a part of the agreement sought to be made are thus as good a component part thereof as the terms

1. As to documentary and oral contracts see *Imamali v. Priyawati* A.I.R. 1937 Nag. 289.

2. *Heilbut, Symmons & Co. v. Buckleton* [1913] A.C. 30; see *Redgrave v. Hurd*, (1881) 20 Ch. D. 1.

3. *Jacobs v. Batavia & General Plantations Trust*, [1924] 1 Ch. 287, 295; *Henderson v. Arthur* [1907] 1 K.B. 10.

4. *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, 47. Evidence Act, Ss. 91, 92.

5. *De Lassalle v. Guildford* [1901] 2 K.B. 215; *Erskine v. Adeane* (1873) 8 Ch. App. 756; *Müller v. Cannon Hill Estates, Ltd.* [1931] 2 K.B. 113.

incorporated in writing.¹ Thus a bill of lading, though ordinarily evidencing a complete contract between the shipper and shipowner, may not be in a given case exhaustive of the terms and conditions arrived at between the parties. Where it is not so exhaustive, it will not be treated as the exclusive evidence of the contract made, evidence of other terms orally made being admissible in addition.²

Where the existence of a contract is to be found out from correspondence, the rule is that the entire bunch of correspondence, that passed between the parties, has to be looked into for determining whether there was a concluded contract. The rule has no application in a case in which the contract has to be evidenced by a formal document in compliance with Article 299 of the Indian Constitution.³ A change will require a fresh compliance.

When a contract has been concluded, a stipulation that the agreement shall be drawn up in a formal document by itself does not mean that the contract has not been concluded. It will be a matter of construction in each case whether the contract had been concluded in order to be binding.⁴

A receipt read somewhat like this: "Received this day Rs. 10,000 as earnest money out of Rs. 62,000 for the contract of sale of land....from X through Z and executed a receipt. It is further declared that the sale-deed would be expected within 3 months and in default the contract would be deemed cancelled..sd.." The vendor contended that though some of the terms were settled, the term relating to the inflation of price in the sale-deed in order to prevent pre-emption was not settled and hence there was no concluded contract; it was held that the document was a record of terms of a validly concluded contract for sale between the parties and the fact that it was described and called as receipt was immaterial.⁵

A contract binds the parties to it and their representatives irrespective of any change in the circumstances. The Court's power to interfere with contracts is limited to such cases as fraud, undue influence, or mistake, and relief against penalty and forfeiture. The Court has no jurisdiction to interfere with a valid contract which was perfectly fair when it was made. The circumstances which are relevant for determining the fairness or unfairness of a contract are those which existed at the time the contract was made.⁶ This general rule as to the binding nature of a validly made agreement is

1. *Walker Property Investments (Brighton) Ltd. v. Walker* (1947) 177 L.T. 204.

2. *S.S. Ardennes (Cargo Owners) v. Ardennes (Owners)*. [1951] 1 K.B. 55: [1950] 2 All E.R. 517.

3. *Chatturbhuj v. Morashwar* A.I.R. 1954 S.C. 236; *Damodar v. Union of India*, A.I.R. 1959 Cal. 526. *Surjit Singh v. Union of India*, A.I.R. 1965 Cal. 191.

4. *Shamjibhai v. Hemchand*, A.I.R. 1952 Nagpur 220; *Harichand v. Govind* 47 Bom. 335; A.I.R. 1923 P.C. 47; *Hukum Chand v. Ran Bahadur* 3 Pat. 625; A.I.R. 1924 P.C. 156; *Currimbhoy & Co. v. Crest*, 60 Cal. 980; A.I.R. 1933 P.C. 29; *Shankarlal v. New Mofussil Co. Ltd.* (1946) Bom. 694; A.I.R. 1946 P.C. 97; *Ridgway v. Wharton* (1857) 10 E.R. 1287.

5. *Deep Chandra v. Sajjad Ali* (F.B.) A.I.R. 19951 All 93.

6. *Tekchand v. Birzabai*, A.I.R. 1942 Nag. 119.

however subject to the doctrines of public policy of the law, statutory and common law prohibition, and frustration.

Terms of contract.—Any statement made by word of mouth at or about the time of forming an agreement or embodied in writing simultaneously with the close of the transaction or at an earlier moment is not necessarily, in the eye of the law, a term of the contract. Where such a statement is a term of the contract, it creates a contractual obligation on the parties. Where it is a mere representation and has not been made fraudulently, it forms no part of the terms of the contract and, therefore, creates no obligation. In every case of dispute, it will be for the Court to decide as to whether a statement made has been made a part of the bargain or a mere representation.¹ Where there is nothing which can be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement, it will be deemed, in law, as a representation and nothing more.² Where a statement is relied on and is made the basis or a part of the contract, it will be distinguished from a mere statement of representation and be given an obligatory force. This rule applies also to cases where an agreement has been made partly by word of mouth and partly in writing.³

Where there is the common intention of both the parties that a particular statement, assertion, assurance, or representation should or should not be a term or basis of the contract, there is obviously no difficulty. Where, however, one party asserts that a given statement was understood and accepted by him as a part of the contract but the other party was not either aware of any such statement or assertion at all having been made or of such an acceptance or understanding on the part of the former, the problem is one where the judges have differed in their pronouncements. Take, for example, the case of a railway or bus ticket. Some of the earlier authorities held that when a passenger took a ticket with conditions printed on it, he was presumed in law to note the contents of the said conditions, and was, therefore, bound by them.⁴ In *Henderson v. Stevenson*,⁵ however, it was observed in the House of Lords that any such technical rule was not advisable. According to their Lordships, the question was one of common sense. The effect of the rules, subject to which a ticket has been issued, for example, would have to be judged in the light of the

1. *Hopkins v. Tanqueray*, (1854) 15 C.B. 130. *Shiv Dayal v. Union of India*, A.I.R. 1963 Punj. 538.

2. *Heilbut v. Buckleton*, [1913] A.C. 30.

3. *Bannerman v. White* (1861) 10 C.B. (N.S.) 844; *Couchman v. Hill* [1947] K.B. 554; [1947] 1 All E.R. 103.

4. *Zung v. S.E. Rly. Co.*, (1869) L.R. 4 Q.B. 539; *Stewart v. L. & N.W. Rly Co.*, (1864) 3 H. & C. 135.

5. (1875) L.R. 2 Sc. & Div. 470. *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E.R. 430 H.L.

surrounding circumstances. The value as well as the nature of the contract would thus determine the effect of the assertions, statements, or declarations claimed to have been treated by one party as a part of the terms of the contract in question.¹ It has also been sometimes observed that the sufficiency or otherwise of the notice given of the conditions sought to be made a part of the contract will depend also on the class of persons sought to be bound thereby.² Where, again, a contract contains the signature of the parties, the English Courts were in some cases inclined to presume that the party signing the agreement must have gone through the document and had understood the contents thereof. When the defendant's signature had been proved, in the absence of fraud, it was wholly immaterial that he had not read the agreement and did not know its contents.³ In the absence of fraud or misleading statements the parties to a contract were presumed to have gone through the terms and conditions of the contract before putting their signature thereto.⁴ This presumption working to the prejudice of one of the parties has, again, been subjected to the nature, value, and form of the contract concerned. The holder of a ticket, for example, is not expected to go through the terms and conditions subject to which the ticket may have been issued, and will not, therefore, be presumed in law consciously to have been a party thereto.⁵ It will accordingly be treated as a question of fact in each case as to whether the party sought to be bound by the terms and conditions of the ticket had gone through them and understood and accepted them as binding upon him. Thus when a ticket or a document was purported by one of the parties to be one of the bases of the contractual obligations sought to be enforced, the Court will require that in order to enable a party to rely on the said bases he must have sufficiently brought them to the notice of the other party who is sought to be bound by them and that must be done before the completion of the contract in question.⁶

As it has been said by Lord Devlin in *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E. R. 430 H. L., previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them.

In cases in which a contract is alleged to be formed on the basis of a receipt, ticket or other unsigned document, the party seeking to enforce it will be required to prove that the other party had been aware or,

1. *Parker v. South Eastern Railway*, (1877) 2 C.P.D. 416, 422.

2. *Parker v. South Eastern Railway*, (1877) 2 C.P.D. 416; *Marriott v. Yeoward Bros.*, [1909] 2 K.B. 993.

3. *Parker v. South Eastern Railway* (1877) 2 C.P.D. 416, 421.

4. *Watkins v. Rymill* (1883) 10 Q.B.D. 178; *L' Estrange v. Graucob* [1934] 2 K.B. 394.

5. *Richardson v. Rowntree*, [1894] A.C. 217; *Marriott v. Yeoward Bros.*, [1909] 2 K.B. 987; *Hood v. Anchor Line (Henderson Bros.)* [1918] A.C. 837; *Chapelton v. Barry, U.D.C.*, [1940] 1 K.B. 532; [1940] 1 All E.R. 356; *Henson v. L.N.E. Ry. Co. & Cootes & Warren, Ltd.*, [1946] 1 All E.R. 653.

6. *Olley v. Marlborough Court, Ltd.*, [1949] 1 K.B. 532; [1949] 1 All E.R. 127.

because of a sufficient notice, ought to have been aware, of the terms and conditions implied by such receipt, ticket or unsigned document. When, however, a document containing contractual terms has been signed, then in the absence of fraud or misrepresentation, the party signing it is bound and it will not be material whether he has read the document or not.¹

Where the common law imposes a duty or liability on a party to the contract, the party thus bound, in order to limit his duty or liability or exonerate himself from the said duty or liability is required to insert in the document embodying the contract or communicate to the other party by word of mouth unambiguous terms limiting or excluding his responsibility that would be otherwise fastened on him. Thus if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit in respect of his liability for negligence, then the clause will be construed as extending only to his liability on grounds other than negligence.²

When the parties to a contract subsequently subscribe themselves to the scheme of a committee of merchants, they will be bound by such a scheme and not by the terms of the original contract.³ In *Monro v. Taylor*⁴ it was observed that acts or communications of the parties, after an agreement, may be evidence of facts existing at the time of the agreement material to its construction, but not to determine its meaning. The construction of a document of title or of a document which is the foundation of the rights of the parties necessarily raises a question of law.⁵ The construction of a contract depends upon the terms thereof.⁶ A company is competent to carry out its objects as specified in the Memorandum of Association and cannot travel beyond the objects. The Articles may explain the Memorandum but cannot extend its scope.⁷ The evidence of usage of trade applicable to the contract which the parties making it knew, or may be presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent.⁸ If

1. *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 All E.R. 430 H.L. *L'Estrange v. Graucob*, [1934] 2 K.B. 394, 403; *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805; [1951] 1 All E.R. 631. *Mukul v. I. A. C.*, A.I.R. 1962 Cal. 311.

2. *Alderslade v. Hendon Laundry, Ltd.*, [1945] K.B. 189; [1945] 1 All E.R. 244; *White v. John Warwick & Co., Ltd.*, [1953] 2 All E.R. 1021.

3. *Ram Nath v. Mannu Lal*, A.I.R. 1923 All 518.

4. (1851) 3 Mac. & G. 713; *Mews' Digest* iii, 524; v, 1025; vii, 435; xix, 652; xx, 975, 991, 1007, 1018, 1065, 1082, 1186, 1240, 1402; 8 Harc, 56; 21 L.J., Ch. 525.

5. *Chunnilal & Co. v. Century Spinning & Manufacturing Co. Ltd.*, A.I.R. 1962 S.C. 1314.

6. *Raghunath Enamels Ltd. v. Union of India*, A.I.R. 1962 Punj. 383; *Buland Sugar Co. Ltd. v. Union of India*, A.I.R. 1962 All. 425.

7. *Lakshmanaswami v. L. I. C.*, A.I.R. 1963 S.C. 1185.

8. *In the matter of the Indian Arbitration Act, 1899*, and *In the matter of Joy Lal & Co. v. Memmotha Nath*, (1915-16) 20 C.W.N. 365; *Krishnarao v. State of Andhra Pradesh*, A.I.R. 1962 Andhra 249.

the deed of lease contains a covenant of renewal without anything more, the presumption is that the lease would be renewed on the same terms and conditions and for the same period as the original lease.¹ According to the established commercial usage, if there is no variation or disparity in the bought and sold notes, the bought and sold notes issued by the brokers constitute the terms of the contract between the parties for whom the brokers act.² A contract will be construed strictly according to its terms.³

Import of express terms.—Where an agreement has been made in writing the Court will gather the intention of the parties from the written expressions.⁴ If an action is brought on a written contract signed by the defendant, it is irrelevant, in the absence of fraud or misrepresentation, whether he has read it or not. If a party has signed a document containing contractual terms, he is bound, in the absence of fraud or misrepresentation, whether he has read it or not.⁵ A passenger will be held to have purchased a ticket *with notice* of the conditions printed on the ticket and displayed on the board in the ticket office.⁶ See also under Section 151, *post*.

If a document expressing the terms of a contract is delivered to one of the parties but is neither signed nor read by him, it is a question of fact, to be decided upon the circumstances of each case, whether the party delivering the document has done what is reasonably sufficient to give notice of the terms to the deliverer.⁷

If a party seeks to rely upon a document as expressing or giving notice of the terms of an agreement he must show that it is a material part of that agreement. It must have been intended as a contractual document and not as a mere receipt or acknowledgment of payment.⁸

The context of the subject-matter, time, place and circumstances are sometimes accepted as modifying or determining the meaning of the expressions used. The custom of the trade or locality may also have the

1. *Hitkarini Sabha v. Jabalpur Corporation*, A.I.R. 1961 M.P. 324.

2. *Radhakrishna v. Tayeballi*, A.I.R. 1962 S.C. 538.

3. *State of Orissa v. Harichandan*, A.I.R. 1964 Orissa 73.

4. *British Movietone News, Ltd. v. London and District Cinemas, Ltd.*, [1952] A.C. 166; [1951] 2 All E.R. 617; *Reliance Marine Insurance Co. v. Duder*, [1913] 1 K.B. 265, 273; *Gill v. Manchester, Sheffield and Lincolnshire Rly.*, (1873) L.R. 8 Q.B. 186; *Shore v. Wilson*, (1842) 9 Cl. & Fin. 355, 526, 565.

5. *L'Estrange v. Graucob (F.), Ltd.*, [1934] 2 K.B. 394; *Parker v. South Eastern Rail Co. Gabell v. South Eastern Rail. Co.*, (1877), 2 C.P.D. 416; *Manuel Raj & Co. v. Manilal and Co.*, A.I.R. 1963 Gujarat 148; *Dalil Khen v. State of Andhra Pradesh*, A.I.R. 1963 Andhra 216; *Buland Sugar Co. Ltd. v. Union of India*, A.I.R. 1962 All. 425.

6. *Mukul v. I. A. C.*, A.I.R. 1962 Cal. 311. *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E.R. 430 H.L.

7. *Parker v. South Eastern Rail. Co. Gabell v. South Eastern Rail Co.* (1877), 2 C.P.D. 416.

8. *Chapellon v. Barry Urban District Council*, [1940] 1 K.B. 532.

same effect.¹ The sense of justice may also in given cases persuade the Court to interpret an agreement in a way other than literal.

Where the language of the contract is capable of a literal and wide, but also of a less literal and more restricted, meaning, all relevant surrounding circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it.²

Subject to any special provisions made under a statute, it is open to the parties to a transaction to contract themselves out of the provisions of a statute. It must however be clearly and satisfactorily established not only that the parties did intend that their liability should be different from that created by the statute, but also that the terms of the covenants expressly so provide without the possibility of any doubt.³ Apart from the statutory provisions disabling the parties to contract themselves out of the provisions of a statute, the Court as a matter of public policy may not allow the parties to contract themselves out of the provisions of a statute, or of the personal law of the parties. Thus, parties cannot, by agreement between themselves, alter their personal law or statute law such as the Civil Procedure Code.⁴

Implied terms of contract.—The terms of a contract are not always fully set out in writing. Even where an agreement is reached partly in writing and partly by word of mouth, the writing and the expressions orally made may not embody all the obligations undertaken as between the parties. The background of the usage of the trade or locality may and does occasionally help the court in deciding as to the nature or incidents of the engagement undertaken. Thus in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. In other transactions as well, established usages, where any, may well prevail. In such cases, the law presumes that the parties do not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Thus the customary obligations, attendant on an engagement, when not altered by the contract, are deemed to be fastened on the parties. The usual practice thus may imply and impose on the parties an obligation though not specified by the

1. *Palgrave, Brown & Son, Ltd. v. S. S. Turid*, [1922] 1 A.C. 397; *Produce Brokers, Ltd. v. Olympia Oil & Cake Co. Ltd.*, [1917] 1 K.B. 320, 330; *Grant v. Maddox*, (1846) 15 M. & W. 737; *Spicer v. Cooper*, (1841) 1 Q.B. 424; *Woodhouse v. Swift* (1836) 7 C. & P. 310; *Smith v. Wilson*, (1832) 3 B. & Ad. 728.

2. *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works*, [1949] 2 K.B. 632; [1950] 1 All E.R. 208, 226.

3. *Hymayun Reza v. Harendra*, A.I.R. 1945 Patna 447. See also under S. 151, *post*.

4. *Latifanbai v. Sakinabai*, (1939) Kar. 432; A.I.R. 1939 Sind 107; 181 I.C. 770.

written terms.¹ The conduct of the parties coupled with a *chitti* may also be found sufficient to establish a contract to repay.²

Section 35 of the (Indian) Sale of Goods Act, 1930, lays down that apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. This statutory obligation of the buyer to apply for delivery is subject to trade usage and custom to the contrary where such custom or usage is presumed to be an ingredient tacitly imported by the parties into the contract. It is not necessary to establish in proving such trade usage or custom antiquity, uniformity and notoriety.³ See *Juggomohun v. Manickchund*, (1859) 7 M.I.A. 263, 282.

The Court may, moreover, supply a term in a contract if to do so is necessary in order to give "business efficacy" to the contract. Such an implication is based upon the presumed and common intention of the parties and is designed to repair their oversight. The Court will, however, interfere in this way only if the oversight is obvious and if an obligation, clearly intended as such, must fail to take effect unless the term is supplied. Thus, the Court has sometimes, by way of interpretation, added terms by way of conditions or warranties, to a contract which terms were considered indispensable by the Court for the implementation of the intention of the parties. The law thus raises an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both the parties must have intended that it should have. Where the parties are dealing with each other on the assumption that the negotiations are to have some fruit but inadvertently saying nothing about a particular circumstance, the Court will draw such inferences as are reasonable from the very nature of the transaction.⁴ The law presumes that the parties to a contract impliedly agreed to do what was necessary for the fulfilment of the intention as evinced in the contract.⁵ This implication in law is based on the idea of the minimum requirement. A term can only be implied if it is necessary in the business sense to give efficacy to the contract.⁶ The term to be implied is thus something so obvious that it goes without

1. *Hutton v. Warren*, (1836) 1 M. & W. 466, 475; *Pelly v. Royal Exchange Assurance*, (1757) 1 Burr. 341; *Sa'vador v. Hopkins*, (1765) 3 Burr. 1707; *Jiwibai v. Ramkuwar*, (F.B.) (1946) Nag. 824, 838; A.I.R. 1947 Nagpur 17; *Juggomohun v. Kaisreechund*, (1862) 9 M.I.A. 260; *In the matter of the Indian Arbitration Act*, 1899, and *In the matter of Joy Lall and Co. v. Monmotha Nath*, (1915-16) 20 C.W.N. 365.

2. *Bajranglal v. Anandilal*, (1944) Nag. 101; A.I.R. 1944 Nag. 124.

3. *Hind Mercantile Corporation v. Miryala Venkataswarlu and Co.*, A.I.R. 1959 Andhra 545; *Binay Krishna v. North Bengal Sugar Mills*, (1945) 2 Cal. 173; A.I.R. 1949 Cal. 490 relied on.

4. *The Moorcock*, (1889) 14 P.D. 64, 68, 70; *Foley v. Classique Coaches Ltd.*, [1934] 2 K.B. Krishnarao v. *State of Andhra*, A.I.R. 1962 Andhra 249.

5. *Mackay v. Dick*, (1881) 6 App. Cas. 251, 263; *McCarrick v. Liverpool Corporation*, [1947] A.C. 219, 231; [1946] 2 All E.R. 646, 651; *Kleinert v. Abosso Gold Mining Co., Ltd.*, (1913) 58 Sol. Jo. 45; *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; *Mona Oil Equipment & Supply Co. Ltd. v. Rhodesia Railways, Ltd.*, [1949] 2 All E.R. 1014.

6. *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592, 605; *Navnitlal & Co. v. Kishanchand & Co.*, A.I.R. 1956 Bom. 151.

saying. The Court will not read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate, although they did not include it in so many words.¹

The nature of a particular engagement also has sometimes led the Courts to presume the existence of an implied term the non-existence of which would seriously affect the implementation of the intention of the parties. A term of good faith and fidelity is implied in a contract of service.² The employer is likewise presumed to have undertaken to do all that is necessary for him to do in law.³ Whether a party was entitled to a reasonable notice or his service was terminable at will is a matter of construction.⁴

In a contract of sale there is always a presumption of an implied term that if a man contracts to buy a thing, he ought not to have something else delivered to him.⁵ A warranty of title can similarly be inferred in the usual cases of sale. There can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another. If the buyer has not received any part of that which he contracted to receive, namely, the property and right to possession, there has been a total failure of consideration.⁶ A term will be implied in any contract for the hire of a ship or other particular chattel that it will be as fit for its purpose as reasonable care and skill can make it.⁷ See also under *Warranty, infra*.

The extent of any obligation of fitness impliedly undertaken by an owner on the letting on hire or hire-purchase of a specific chattel, such as a motor vehicle, depends on the contractual intention of the parties, which is to be ascertained from the provisions of the agreement and the relevant facts.⁸

It spite of all these illustrations, it has to be admitted, however, that it is difficult to say how far and in what terms a presumption of an implied term will be held operative in a particular fact-situation. It can only

1. *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206 : [1939] 2 All E.R. 113 on appeal *Southern Foundries (1926) Ltd. v. Shirlaw*, [1940] A.C. 701 : [1940] 2 All E.R. 445 ; *Sethia (1944), Ltd. v. Partabmull Rameshwar*, [1950] 1 All E.R. 51, 59.

2. *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.*, [1946] Ch. 169 : [1946] 1 All E.R. 350 ; *Kimber v. Willet (William), Ltd.*, [1947] K.B. 570 : [1947] 1 All E.R. 361 ; *Robb v. Green*, [1895] 2 Q.B. 315, 320.

3. *Gregory v. Ford*, [1951] 1 All E.R. 121.

4. See *Australian Blue Metal Ltd. v. Robert Frank Hughes*, [1962] 3 W.L.R. 802 P.C. (a case from New South Wales ; licence of right to mine for minerals).

5. *Nichol v. Godts*, (1854) 10 Exch. 191 ; *Chanter v. Hopkins*, (1838) 4 M. & W. 399, 404.

6. *Rowland v. Dival*, [1923] 2 K.B. 500.

7. *Reed v. Dean*, [1949] 1 K.B. 188 ; *Samuels v. Davis*, [1943] 2 All E.R. 3 ; *Ingham v. Emes*, [1955] 2 All E.R. 740.

8. *Astley Industrial Trust, Ltd. v. Grimley*, [1963] 2 All E.R. 33 C.A.

be said that a judge will hesitate to be liberal in the extension of the presumption.¹

Apart from the local or commercial usage and judicial interpretations, statutory provisions also sometimes impose upon the parties terms which have the same binding force as they would have had, had the parties thought fit to incorporate them in the contract they entered into. These statutory provisions may have varied consequences. To begin with English illustrations. By Section 8 of the English Hire-Purchase Act, 1938, various terms are statutorily implied in all contracts of hire-purchase to which the Act extends. Under Section 8 (1) of the Act said there are an implied condition as to title, and implied warranties of quiet possession and freedom from incumbrances in favour of any third party.² The warranties and conditions thus set out will be implied notwithstanding any agreement to the contrary. In this respect, the parties are prevented from contracting out of the statutory provisions of the Act. Section 8, moreover, is not exhaustive of the protection that is accorded to a hirer. Any condition or warranty that is implied in any hire-purchase agreement under any other enactment or rule of law is saved by Section 8 (4) of the Act. Except where the goods are second-hand and are stated to be such in the note or memorandum of the agreement made in pursuance of Section 2 of the Act, the law will attribute an implied condition of merchantable quality. Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there will be, under Section 8 (2) of the Act, an implied condition that the goods delivered shall be reasonably fit for such purpose. The owner is not entitled, under Section 8 (3), to rely on any provision in an agreement excluding or modifying this condition of fitness unless he proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him.³

The English Sale of Goods Act, 1893, similarly, protects the interests of the buyer whose title or possession is disturbed. In a sale of goods there will also be, as seen above, an implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. These protections will not be implied if the circumstances of the contract are such as to show a different intention.⁴ Where there is a contract for

1. *Sethia (1944), Ltd. v. Partabmall Rameshwar*, [1950] 1 All E.R. 51, 59; *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1948] A.C. 173; [1947] 2 All E.R. 331; *Deyong v. Shenburn*, [1946] 1 All E.R. 226; *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] A.C. 108; [1941] 1 All E.R. 33.

2. *Lloyds & Scottish Finance Ltd. v. Modern Cars & Caravans Ltd.*, [1964] 2 All E.R. 732 Q. B. D.

3. *Reed v. Dean*, [1949] 1 K.B. 188; *Samuels v. Davis*, [1943] K.B. 526; [1943] 2 All E.R. 3; *Ingham v. Emes*, [1955] 2 All E.R. 740.

4. *Mason v. Burningham*, [1949] 2 K.B. 545; [1949] 2 All E.R. 134; *Niblett v. Confec-tioners' Materials Co.*, [1921] 3 K.B. 387.

the sale of goods by description, there is an implied condition that the goods will correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.¹ The condition will normally be implied where the buyer has not seen the goods and relies solely on the description given by the seller.² In *Nicholson & Venn v. Smith*³ the buyers had seen the goods but proved that they still relied essentially on the description and that the discrepancy between the description given and reality was not apparent at the time. In the circumstances the sellers were held as having broken an implied condition. The English Sale of Goods Act, 1893, by Section 14, also attributes implied conditions as to quality or fitness. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is, however, no implied condition as to its fitness for any particular purpose.⁴

In *Richard Thorold Grant v. Australian Knitting Mills*⁵ the plaintiff had bought some undergarments at the shop of John Martin and Co., Ltd. and these articles had been made by the Australian Knitting Mills, Ltd. The articles when worn by the plaintiff caused a skin disease, and their Lordships held that the manufacturer of an article of clothing was under a legal duty to the ultimate purchaser or user of the article to take reasonable care that the article was free from any latent or hidden defect likely to cause injury to health; and this duty was not affected by the fact that the manufacturer sold the article to a retailer and the purchaser or user purchased it from the retailer. If the manufacturer does not take reasonable care and a purchaser suffers injury, the manufacturer is liable for negligence. It is a question of fact in each case whether the seller as a reasonable man must have known that reliance was placed on his skill or judgment. He will be taken to have this knowledge if a disclosure had been made of the special purpose for which the goods sold had been required.⁶ Moreover, the "mere fact that an article

1. Section 13, *ibid.*

2. *Varley v. Whipp*, [1900] 1 Q.B. 513.

3. (1947) 177 L.T. 189. See also *Wells (Merstham), Ltd. v. Buckland Sand Co. Ltd.*, [1964] 1 All E.R. 41 Q.B.D.

4. *Priest v. Last*, [1905] 2 K.B. 148; *Chaproniere v. Mason*, (1905) 21 T.L.R. 633; *Gedding v. Marsh*, [1920] 1 K.B. 688; *Grant v. Australian Knitting Mills*, [1936] A.C. 85; *Macfarlane v. Taylor*, (1868) L.R. 1 Sc. and Div. 245; *Baldry v. Marshall*, [1925] 1 K.B. 260.

5. (A case from Australia) A.I.R. 1936 P.C. 34; 159 I.C. 667; 1935 O.W.N. 1327; [1936] A.C. 85.

6. *Manchester Liners, Ltd. v. Rea, Ltd.* [1922] 2 A.C. 74.

sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances...where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name;...there the proviso (in the Section 14(1) of the English Sale of Goods Act)—does not apply.... Where the buyer says to the seller, 'I have been recommended such and such an article'—mentioning it by its trade name—'will it suit my particular purpose?' naming the purpose, and thereupon the seller sells it without more; there again the proviso has no application....Where the buyer says to the seller, 'I have been recommended so and so'—giving its trade name—as suitable for the particular purpose for which I want it. 'Please sell it to me.' In that case the proviso would apply and that the implied condition of the thing's fitness for the purpose named would not arise...the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be?"

Where the goods are bought by description from a seller who deals in goods of that description, (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed.¹

Merchantable means that the goods are suitable for any purpose for which they are normally used.² The requirement of merchantability must be satisfied even though an article is clearly sold under its patent or other trade name.³

The implied conditions relating to quality or fitness as treated in Sections 13 to 15 of the English Sale of Goods Act, 1893, operate as exceptions to the English common law rule of *caveat emptor* (buyer take care), which is referred to in the opening words of Section 14 of the Act. In contracts of utmost good faith also the application of the rule of *caveat emptor* is restricted. Whether the sale is for a particular purpose, it is a sale by description or sample or by sample and by description, conditions relating to quality or fitness are implied by the Act. The liability of the contract-breaker exists irrespective of whether the breach of the condition or warranty is due to his negligence or other fault. Except in a few cases, as noted before, a party may contract out of the provisions of an Act. The Courts are, however, inclined, if possible, to construe terms and clauses

1. Sec. 14 (2) Sale of Goods Act, 1893.

2. *Cammell Laird & Co. v. Manganese Bronze & Brass Co.* [1934] A.C. 402, 430.

3. *Wilson v. Rickett, Cockerell & Co. Ltd.* [1954] 1 Q.B. 598; [1954] 1 All E.R. 868; *Drummond v. Van Ingen* (1887) 12 App. Cas. 284; Section 15 of the English Sale of Goods Act, 1893.

which will tend to preserve the implied liabilities.¹

As it has been seen, a given document or a given set of statements may not necessarily constitute the whole contract. The total contract may thus consist in the terms as expressed by the parties *plus* the additional terms, if any, which the law holds to be included and *less* any terms used by the parties which the law holds to be excluded. An implied term is thus a term of the total contract not expressed by the parties.²

A court should not imply stipulations merely because they appear reasonable; they can be taken as implied when the Court is satisfied that they should necessarily have been intended by the parties when the contract was made.³ When a loan is contracted it is an implied term of the agreement that the loan shall be repaid.⁴ A purchaser of immovable property is entitled to receive and the vendor is bound to give, a title free from reasonable doubt.⁵ Where there is an express term requiring the continuance of the principal subject-matter, or giving the plaintiff a right to a continuing benefit, the Court will not imply a condition that the plaintiff's right in this respect shall cease on certain events not expressly provided for.⁶ From the mere fact that a bill of exchange has been executed, it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of a document so as to exclude oral evidence to prove the terms agreed upon.⁷ The giving of a negotiable security by a debtor to his creditor operates, *prima facie*, as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity.⁸ When a promissory note or any other instrument is given by the borrower to the lender in connection with the loan, either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken are a question of fact and not of law.⁹

Subject to the statutory provisions, where any, a term is to be implied in marine or fire policies that the assured should not recover from the insurer an amount greater than the loss which he had sustained; but if the assured recovered from a third party a sum in excess of that loss the insurer's rights were limited to recovering from the assured any sum paid by the insurer to the assured.¹⁰ See also Section 34 of the Marine Insurance Act, 1963.

1. *Harling v. Eddy*, [1951] 2 K.B. 739; [1951] 2 All E.R. 212; *Nicholson and Venn v. Smith Marriot* (1947) 177 L.T. 189; *Andrews v. Singer* [1934] 1 K.B. 17; *Baldry v. Marshall* [1925] 1 K.B. 260; *Wallis, Son and Wells v. Pratt and Haynes* [1911] A.C. 394.

2. Modern Law Review, (1961) vol. 24, 421.

3. *Official Assignee of Madras v. Johnson Sons & Co., Ltd.* (1931) 54 Mad. 409; *Shivlal Mulchand v. Manekji Mancherji* (1930) 54 Bom. 510.

4. *Maung Chit v. Kareem Oomer & Co.* (F.B.) (1934) 12 Rang. 500.

5. *Pitamber v. Cassibai* (1887) 11 Bom. 272.

6. *Shivlal Mulchand v. Manekji Mancherji* (1930) 54 Bom. 510.

7. *Kundan Lal v. Bhikari Das* (1929) 27 All. L.J. 333.

8. *Maung Chit v. Kareem Oomer & Co.* (F.B.) (1934) 12 Rang. 500.

9. *Maung Chit v. Kareem Oomer & Co.* (F.B.) (1934) 12 Rang. 500.

10. *Yorkshire Insurance Co. Ltd. v. Nisbet Shipping Co. Ltd.* [1961] 2 W.L.R. 1043.

In the absence of a special agreement to the contrary, a proprietor of an estate or tenure had a right to make a general survey and measurement of the lands comprised in his estate under Section 37 of Bengal Rent Act, 1869.¹

Condition and warranty.—The term condition in English common law of contract means either of two things. It is used to denote an event independent of and external to the bargain undertaken. In this sense, it denotes an event by which an obligation is suspended or cancelled. It is also used to mean a term in the bargain which may be enforced at the instance of either of the parties. In this latter sense, condition is an essential term of the contract.² A condition being a term of a contract of an important character, when broken, it *prima facie* entitles the injured party to repudiate all further liability and also to recover damages.³ From a wider point of view, however, the term 'condition' may be used to denote both the things without any fear of confusion. Even where a condition denotes an event by which an obligation is suspended or cancelled it may well be accepted as a term of the contract itself though the condition as such cannot be treated as an undertaking enforceable in law.

Where the parties to an agreement have agreed to suspend an obligation or a right until the happening of a stated event, the said obligation or right is said to be subject to a condition precedent.⁴ Thus, where the stated event has not happened the parties will not be in a position to enforce the said obligation or right.⁵ The parties may also agree that an existing obligation or right is to terminate on the happening of some stated event. In this latter case, the obligation or right is said to be subject to a condition subsequent.⁶

When a party to a contract has performed or is ready and willing to perform, his obligations under that contract, he is entitled to the performance by the other contracting party of all the obligations which rest upon him. For the purpose of performance, however, through the medium of the law, all the obligations undertaken in the course of an agreement are not of equal importance. Some of the obligations undertaken go so directly to the substance of the contract, or, in other words, are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. An obligation of the former class is generally known as a condition

1. *Brojendro Coomar v. Krishna Coomar* (1881) 7 Cal. 684.

2. *Oscar Chess, Ltd. v. Williams*, [1957] 1 All E.R. 325.

3. *Wallis, Son and Wells v. Pratt and Haynes* [1910] 2 K.B. 1003; on appeal [1911] A.C. 394.

4. *Pym v. Campbell* (1856) 6 E. & B. 370.

5. *Worsley v. Wood* (1796) 6 T.R. 710; *Welch v. Royal Exchange Assurance*, [1939] 1 K.B. 294.

6. *Head v. Tattersall* (1871) L.R. 7 Ex. 7.

and an obligation of the latter class as a warranty.¹ The term condition in the context means a vital or essential obligation forming a part of the contract itself as distinguished from the term condition, whether as a condition precedent or a condition subsequent, which seeks to suspend the creation or emergence of an obligation or right at all or to extinguish an obligation or right after it has been created. Both a condition and a warranty may consist in an undertaking relating to the future or in the allegation of a fact. Where the given undertaking or allegation of a fact is so vital *apropos* the transaction as to affect the substance and foundation thereof it is the case of a condition. Where, on the other hand, the undertaking given or the fact alleged is of a subsidiary nature and not substantial, the case will be one of warranty.² The breach of a condition in the sense of a vital term in a contract enables the party prejudiced to repudiate any further liability on his part and also to sue the party responsible for the breach for damages.³ The breach of a warranty, on the other hand, does not enable the party prejudiced to repudiate all further liability on his part but only to recover damages.⁴

Where in an agreement for the sale of land the vendor is to deduce a marketable title free from all reasonable doubts, the agreement as to title has to be sufficiently complied with.⁵ Where a contract was made for goods to be ordered from Europe, such a contract could not be fulfilled by offer of goods of same description not ordered out for the purchasers but bought by vendors in Bombay.⁶ The question as to whether a particular document is a mortgage by conditional sale or an out and out sale with a condition of repurchase depends on the facts and circumstances of each case.⁷

Warranty.—‘Warranty’ means a guarantee or security. It is an agreement either accompanying a transfer of property, or collateral to the contract for such transfer, or to any other agreement or transaction, and in so far as it is a contract, a warranty does not differ from any other contractual promise. A warranty may be express or implied by law or statute. Implied warranties have been said to underlie or to be the gist of actions for negligence or breach of duty arising out of the special relations between parties. As a general rule an express warranty, or a known usage, excludes any implication of warranty in regard to the same subject-matter. But upon sale of goods if the express warranty (which includes representation, such as ‘sample’) has been superadded for the benefit of the buyer or is not inconsistent with the implied warranty the latter is not excluded.

The expression ‘warranty’ in the English Sale of Goods Act, 1893, Section

1. *Wallis v. Pratt* [1910] 2 K.B. 1003, 1012, approved, [1911] A.C. 394.

2. *Bensten v. Taylor* (2), [1893] 2 Q.B. 274, 281.

3. *Poussard v. Spiers*, (1876) 1 Q.B.D. 410; *Behn v. Burness* (1863) 3 B. & S. 751.

4. *Bettini v. Gye* (1876) 1 Q.B.D. 183; *Harrison v. Knowles* [1917] 2 K.B. 606.

5. *Shrinivasdas v. Meherbai* (1916-17) 44 I.A. 36.

6. *Bombay United Merchants' Co. v. Doolubram Sakulchaud* (1888) 12 Bom. 50.

7. *Darshan v. Ganga A.I.R.* 1962 Patna 53.

62(1), 'as regards England and Northern Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such a contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated'; and 'as regards Scotland' it is provided by the same Section that a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

The same Act does not define a condition which, in contract, is a stipulation which goes to the root of the contract and the breach or non-performance of which absolves the promisee from his part of the contract and entitles him to repudiate it *in toto*. Whether a stipulation is a condition or a warranty depends entirely on the construction of the contract.

There is nothing, if the facts are present, to prevent the performance or fulfilment of a warranty in its strict sense of a collateral agreement from being at the same time a condition either of a transfer of property or of the entire contract. On the other hand, the person entitled to the benefit of a condition is at liberty to waive his right to repudiate upon condition broken and merely claim damages or compensation for breach of the collateral agreement. The right to repudiate may also be lost if the promisee has adopted the transaction, or the rights of the parties have been so altered as to prevent a return to the *status quo ante*.¹ The warranty under Section 55 of the Transfer of Property Act, 1882, can be contracted out by the necessary agreement as between the parties.²

A warranty is a less important term of a contract. If broken, the injured party may sue for damages.³ A warranty⁴ is an express or implied statement of something which the party undertakes shall be part of a contract, and though part of the contract yet collateral to the express object of it. But in many of the cases, the circumstances of a party selling a particular thing by its proper description had been called a warranty and the breach of such a contract a breach of warranty, but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that it is not a warranty; there is no warranty that he should sell peas; the contract is to sell peas and if he sends him any thing else in their stead it is non-performance of it.⁵

The proper significance of the word 'warranty' in the law of England is an agreement which refers to the subject-matter of a contract, but not being an essential part of the contract either intrinsically or by agreement, is collateral

1. Wharton : *Law Lexicon*, 14th ed., 1957, 1055-56.

2. *Narasimharayudu v. Ankineedu* A.I.R. 1962 Andhra 192.

3. *Wallis, Son and Wells v. Pratt and Haynes* [1910] 2 K.B. 1003 : on appeal, [1911] A.C. 394.

4. Stroud : *Judicial Dictionary*, 3d ed., 1953, vol. 4, 3259.

5. *Chanter v. Hopkins*, 8 L.J. Ex. 16; *Azemar v. Casella*, 36 L.J.C.P. 264.

to the main purpose of such a contract. Yet irrespective of this, the word came to be employed in England where what was really meant was something of a wider operation, a pure condition.¹

In essence warranty is contractual in its nature. A statement which is not contractual cannot be converted into a cause of action by calling it a warranty.² An affirmation at the time of sale is a warranty, provided it appears on evidence to have been so intended.³ A parol affirmation that the drains of a house were in good condition was held to amount to a warranty, and was collateral to the written agreement for letting of the house, and could accordingly be relied on and given in evidence by the tenant.

In the sale of goods, as seen above, "warranty" as regards England and Northern Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purposes of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated: As regards Scotland, a breach of warranty shall be deemed to be a failure to perform a material part of the contract. Speaking generally, a sale of goods implies a warranty of title but not of quality, except as to title, where the circumstances negative the implication, or where as to quality, the implication arises when there is a stipulated quality or when the goods are supplied for a specified purpose.

Generally, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.⁴ But as it has been held in *Lloyds & Scottish Finance Ltd. v. Modern Cars & Caravans (Kingston) Ltd.*, [1964] 2 All E. R. 732 Q. B. D., there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods and shall have them free from charge or encumbrance.

An express warranty does not exclude an implied warranty that is not inconsistent with it.

In the English Marine Insurance Act, 1906, Section 35 (3) as well as in some earlier English decisions "warranty" has been used while "condition" would be the appropriate expression, according to the modern English use of these terms.⁵ See also Section 35 (3) of the (Indian) Marine Insurance Act, 1963, and Sections 35 to 43 of the same Act retaining the same anomaly.

1. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413.

2. *Finnegan v. Allen*, [1943] K.B. 425.

3. *Cross v. Gardner*, Carth 90; 3 Mod. 261; *Medina v. Stoughton*, Salk. 210; *Pasley v. Freeman*, 3 T.R. 51; *De Lassalle v. Guildford*, [1901] 2 K.B. 215.

4. *In re Andrew, Yule & Co.* A.I.R. 1932 Cal. 879; see English Sale of Goods Act, 1893, s. 14, exceptions contained in the subsections to S. 14. See also Section 16 of the (Indian) Sale of Goods Act, 1930.

5. *Dixon v. Sadler* (1839) 5 M. & W. 405, 414; *Chanter v. Hopkins* (1838) 4 M. & W. 399, 404; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413.

In charter-parties and marine insurance, "warranted" or "warranty" is synonymous with "condition"¹ strictly binding on the party making it. But a representation, *i.e.*, a statement not appearing on the face of the instrument itself, "need only be performed in substance", and an error in a representation does not vitiate the policy if made without fraud and not false in a material point, or if the representation be substantially; though not literally, fulfilled.² Where the representation is fraudulent, it is actionable.³

In a contract for work and materials there is a warranty that the materials used will be of good quality and reasonably fit for that purpose, unless the circumstances of the contract are such as to exclude any such warranty, *e.g.*, unless the person doing the work is given express instructions as to where he is to get the materials.⁴

A warranty is a stipulation subsidiary to or collateral with a principal contract, a breach of which gives rise to a claim for damages but does not affect the principal contract. Having regard to the rule *caveat emptor* and to the obligation of a purchaser to make inquiries for himself, it is difficult to establish a warranty in a contract for the sale of the land.⁵

In a contract by builders or the owners of a building site for the sale of a house to be erected or in course of erection there is an implied warranty that the house will be properly built and fit for habitation.⁶

Miss-statements in proposal forms to lead to insurance though innocent are warranties.⁷

Where a warranty regarding licences has to be implied in a contract for the sale of goods the warranty will generally be to use all reasonable diligence to obtain a licence, but each case must be decided according to its own circumstances. The person whose duty it is to apply for a licence may either warrant that he will get it, that is an absolute warranty, or he may warrant that he will use all due diligence in getting it. When nothing is said in the contract it is usually the latter class of warranty which is implied. Thus, when on the true construction of a contract and in the circumstances it appears that the sellers warranted absolutely that they would obtain an export licence, they will be liable in damages for a breach of the contract.

The two expressions "condition" and "warranty" are now used in two distinct senses. In any modern exposition of the law of contract, "warranty" will not denote "condition". In spite of this, it will be noted that the distinction between condition and warranty may not be in many fact-situations

1. *Behn v. Burness*, 32 L.J.Q.B. 205; *Barnard v. Faber*, [1893] 1 Q.B. 340.

2. *Union Insurance v. Willis* [1916] A.C. 287.

3. *Hornal v. Neuberger Products, Ltd.* [1956] 3 All E.R. 970.

4. *G.H. Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46.

5. *Terrene v. Nelson*, 157 L.T. 254; *London County Freehold & Leasehold Properties v. Berkeley Property & Investment Co.* 155 L.T. 190.

6. *Laurence v. Cassel* [1930] 2 K.B. 83; *Miller v. Cannon Hill Estates, Ltd.* [1931] 2 K.B. 113.

7. *Holmes v. Scottish Legal Life Assurance Society*, 48 T.L.R. 306.

a workable proposition. Moreover, the injured party may elect, or in certain circumstances, may be compelled, to treat a breach of condition as if it were a breach of warranty.¹

A party to a contract may exclude liability for all conditions or warranties, statutory or otherwise, if he uses precise and appropriate language.² A party to a contract for the sale of goods may exclude the statutory conditions and warranties, but he must use language precisely appropriate to his purpose.³ Though a party may thus, by using appropriate language in a contractual document, exclude or modify liability both for conditions and for warranties, he may not invoke such excluding or modifying words to excuse his failure to perform an obligation which is the fundamental basis of the contract and the non-performance of which destroys the very purpose of the contract. Whether an obligation is of this nature depends upon the facts of each case.⁴ A "warranty" was broken by shipping a quantity of steel in excess of the net registered tonnage.⁵ The seaworthiness, of which, in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured.⁶

It is open to the parties to a contract to make a particular stipulation a condition, but where, upon the true construction of the contract, it will appear that they have not done so, it would be unsound and misleading to conclude that, being a warranty, damages is a sufficient remedy. The remedies open to an innocent party for breach of a stipulation which is not a condition strictly so-called depend entirely upon the nature of the breach and its foreseeable consequences. Where the stipulation as to seaworthiness was not a condition in the strict sense, the question was whether the unseaworthiness found by the judge had gone so much to the root of the contract that the charterers were entitled then and there to treat the charter-party as at an end.⁷

Even where there has been a breach of a warranty or condition, the purchaser may take delivery under Section 13 of the Sale of Goods Act, 1930, and elect to treat it as a breach of warranty and claim a diminution or extinction of the price under Section 59 of the Sale of Goods Act. Where the buyer has set up the breach of warranty of quality in order to claim a diminution of price under Section 59 (1) (a), he is entitled to all damages

1. *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003: on appeal, [1911] A.C. 394.

2. *L'Estrange v. Graucob (F.), Ltd.* [1934] 2 K.B. 394.

3. *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003: on appeal [1911] A.C. 394.

4. *J. Spurling, Ltd. v. Bradshaw* [1956] 2 All E.R. 121; *Karsales (Harrow), Ltd. v. Wallis*, [1956] 2 All E.R. 866.

5. *Hart v. Standard Marine Insurance Co. Ltd.* (1889) 22 Q.B.D. 499.

6. *Clapham v. Langton* 34 L.J.Q.B. 46: 10 L.T. 875: 12 W.R. 1011 Ex. Ch.; *Burgess v. Wickham* 3 B. & S. 669: 33 L.J.Q.B. 17: 8 L.T. 47: 11 W.R. 992.

7. *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 W.L.R. 474, 488, 489 C.A.

resulting as a natural and ordinary consequence of the breach of contract in supplying a damaged article or an article of an inferior quality than the one contracted for.¹

The warranty which is implied in a contract for the sale of a house in course of construction, that the house when completed shall be fit for human habitation, extends to the foundations of the house below ground. The architect was liable in damages for breach of a warranty or of a collateral contract, notwithstanding the illegality affecting the main contract.²

A warranty that the house when completed, would be fit for human habitation should not be implied when there was an express contract between the parties as to the way in which the building was to be completed and the provisions of the contract had been exactly complied with.³

On September 23, 1954, the Syrian legislature, by decree, made certain provisions prohibiting trade with Israel, and as a result vessels which had called at Israeli ports were refused permission to anchor at Syrian ports, although such permission might be granted if their owners offered sufficient guarantees to the authorities against non-repetition of infringements of the boycotting provisions. By a charter-party dated May 17, 1956, it was agreed that the *S. S. Nizetti* should "proceed to Lattakia (Syria) or so near as she may safely get" and load a full cargo of wheat and then "proceed to one or two ports in charterers' option out of Philippe ville, Alger or Oran". The ship was stated to be "now trading and expected ready to load under this charter about May 24, 1956."

During February, 1955, the *Nizetti* had discharged cargo at *Haifa, Israel*. Thereafter she passed through the Suez Canal four times and on each occasion the master signed a declaration of future non-co-operation with Israel. At the date of the charterparty the shipowners knew that the *Nizetti* had called at Haifa and that the master had made declarations of future non-co-operation with Israel, but the charterers neither knew nor ought to have known that.

The *Nizetti* arrived at *Lattakia* under the charterparty on May 28, 1956, but was refused free pratique. On May 30, the master made a declaration of non-co-operation with Israel, but was still refused permission to load. On June 2, the Syrian authorities prohibited the export of grain to Algeria as from June 3. On June 5, the *Nizetti* sailed from Lattakia without having loaded. The charterers claimed damages alleging breach of the charterparty, their claim being for the loss of profit on the transaction to purchase grain for shipment to North Africa, and for the loss of the money which they

1. *Mangilal v. Shantibai A* .I.R. 1956 Nagpur 221. *Union of India v. Rallia Ram* A.I.R. 1963 S.C. 1685.

2. *Jennings v. Tavenor* [1955] 2 All E.R. 769.

3. *Lynch v. Thorne* [1956] 1 All E.R. 744 C.A.

any rule or condition found to be contrary to natural justice or to be unfair and unreasonable should be held to be invalid.¹ Against this inclination of some of the judges there has been the predominance of the judicial pronouncements upholding the implications of agreements voluntarily made however lenient they may be in their incidents in favour of one party and rigorous to the prejudice of the other.² In an all-embracing Welfare State as well as in a *laissez faire* capitalism the former view will prove more helpful to the helpless citizens. See *Limiting and excluding clauses*, above. See also *Protecting clauses* under Section 73, *post*.

Material alterations.³—A material alteration in an instrument effects a new and second instrument. What is a material alteration is an issue of construction.⁴ An alteration will not be material if made before the completion of the execution of the instrument in question. So long as an instrument is in the making (*in fieri*), the alteration, if any, is not material.⁵ The appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to act. Before such acceptance by the arbitrator the name of a co-arbitrator may be added as the instrument was *in fieri*.⁶ A writing proposed to be executed as a deed may be altered by erasure or interlineation or in any other way before it is so executed; and any alteration so made before execution does not affect the validity of the deed. Any alteration, erasure or interlineation appearing upon the face of the deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed. When a writing has been altered it is the practice to note in the attestation clause what alteration has been made, and this practice should always be followed.⁷

A material alteration is one which varies the rights, liabilities, or legal

1. *Thompson v. L. M. & S. Ry. Co.*, [1930] 1 K.B. 41, 53, 56; *Parker v. S. E. Ry. Co.*, (1877) 2 C.P.D. 416, 428; *Mukul v. I. A. C.*, A.I.R. 1962 Cal. 311; *Sohan Singh v. State Bank of India Ltd.*, A.I.R. 1964 Punj. 123.

2. *British Movietonebus Ltd. v. London and District Cinemas, Ltd.*, [1951] 2 All E.R. 617, 624; [1952] A.C. 166, 183; *F.A. Tamplin S. S. Co. Ltd. v. Anglo-Mexican Petroleum Products Ltd.*, [1916] 2 A.C. 397, 404; *Grand Trunk Rail Co. of Canada v. Robinson*, [1915] A.C. 740, 747.

3. As to stamp duties for material alterations see author's *Indian Stamp Act, 1899*, 2nd ed. 1963, 138-44.

4. *Joharmal v. Chettyar Firm*, (1936) 14 Rang. 29; *Subrahmania v. Krishna*, (1900) 23 Mad. 137; *Ramlagan v. Akleshwar*, A.I.R. 1958 Pat. 211; *Gogun v. Dhuronidhur*, 7 Cal. 616; *Anirudhan v. Thomco's Bank Ltd.*, A.I.R. 1963 S.C. 746.

5. *Webber v. Maddocks*, (1811) 170 E.R. 1285; *Maston v. Booth*, (1816) 105 E.R. 1033; *Kennelley v. Nash*, (1816) 171 E.R. 527; *Downes v. Richardson*, (1822) 106 E.R. 1337; *Leykariff v. Ashford*, (1827) 5 L.J. (O.S.) C.P. 90; 12 Moore C.P. 281; *Hall v. Chandless*, (1827) 130 E.R. 714; *Sherrington v. Jermyn*, (1828) 172 E.R. 462; *Jones v. Jones*, (1833) 149 E.R. 589; *Spicer v. Burgess*, (1834) 149 E.R. 1023; *Wright v. Inshaw*, (1842) 63 R.R. 848; *Tarleton v. Shinglar*, (1849) 137 E.R. 322; *Shamdas v. Khimannal*, A.I.R. 1914 Sind 90; 29 I.C. 602; *Halsbury v. Laws of England*, 3rd edn., vol. 11 (1955), para 604; *Kameswararao v. Hemalatham-mara*, A.I.R. 1959 Andh. 596.

6. *Shamdas v. Khimannal*, A.I.R. 1914 Sind 90; 29 I.C. 602.

7. *Halsbury v. Laws of England*, 3rd edn., vol. 11 (1955), S. 598, notes (i).

position of the parties ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.¹ The alteration may be inscribed on the face of the instrument as well as on the back of it.² Any material alteration in an instrument, even with the consent of the parties, vacates the original instrument and makes it a new instrument liable to fresh stamp duty unless the alteration was made before issue, or in order to correct a mistake, or to supply an omission and in furtherance of the original intention of the parties.³ An alteration in an instrument made in good faith by one of the parties to it, without the knowledge of the other, to carry out the original intention of the parties does not vitiate the instrument.⁴ Introduction of a new term replaces the original contract.⁵ See *Surjit Singh v. Union of India*, A.I.R. 1965 Cal. 191.

Alterations of time of payment or performance are generally considered as material alterations.⁶ The law of limitation being a vital factor, alteration in the date of an instrument is also material.⁷ The alteration of the date of execution of a particular document is *prima facie* a material alteration. The onus will be on the person making the alteration to show that the alteration of the date in the particular circumstances was not material.⁸ The date of a bond was altered from 11 September to 25 September. The fraud of alteration though not proved rendered the bond void and not receivable in

1. Halsbury : *Laws of England*, 3rd edn., vol. 11 (1955) para 599; *Nathulal v. Gomi Kuar*, (1940) All. 625 : A.I.R. 1940 P.C. 160 : (1940) Kar. 287 : 190 I.C. 135.

2. *Reed v. Deere*, (1827) 7 B. & C. : 108 E.R. 720.

3. *Kershaw v. Cox*, (1800) 170 E.R. 603; *Cole v. Parkin*, (1810) 104 E.R. 184; *Clark v. Blackstock*, (1816) 17 R.R. 667; *Jacob v. Hart*, (1817) 105 E.R. 1196; *Brutt v. Picard*, (1824) 27 R.R. 727; *Byron v. Thompson*, (1839) 113 E.R. 324; *Hartly v. Manson*, (1842) 134 E.R. 71; *Hamelin v. Bruck*, (1847) 115 E.R. 1290 : 9 Q.B. 306; *Barker v. Aston*, (1858) 175 E.R. 687; *Aldous v. Cornwell*, (1868) 3 Q.B. 573; *Bourdh v. Greenwood*, (1871) 13 Eq. 181 : 25 L.T. 782 : 22 W.R. 166; *Suffell v. Bank of England*, (1882) 9 Q.B.D. 555; *Earnest v. Loma Gold Mines*, [1897] 1 Ch. 1; *Sadgrove v. Bryden*, [1907] 1 Ch. 318; *Lakshammal v. Narasimha*, 38 Mad. 746 : A.I.R. 1916 Mad. 284 : 21 I.C. 445; *Ananda v. Ananda*, 44 Cal. 154 : A.I.R. 1917 Cal. 811 : 35 I.C. 182; *Tribeni v. Sahu*, A.I.R. 1919 Low. Bur. 45; *In re Jajodia Cotton Mills, Ltd.*, A.I.R. 1927 Cal. 612 : 103 I.C. 629; *Pestonji & Co. v. Cox & Co.*, (1928) 52 Bom. 589 : A.I.R. 1928 P.C. 231 : 113 I.C. 124; Halsbury : *Laws of England*, 3rd edn., vol. 11 (1955), para. 601; *Sivarama v. Thiruvadinatha*, A.I.R. 1957 Trav. Co. 189.

4. *Ananda v. Ananda*, 44 Cal. 154 : A.I.R. 1917 Cal. 811 : 35 I.C. 182.

5. *Lachminarain v. Hoare, Miller & Co.*, (1914) 41 Cal. 35.

6. *Bowman v. Nichol*, (1794) 101 E.R. 302; *Outhwaite v. Lunt Ley*, (1815) 171 E.R. 58; *Bacon v. Simpson*, (1837) 150 E.R. 1064; *Christacharu v. Kribasayya*, (F.B.), (1886) 9 Mad. 399 : 10 I.J. 409; *Athar Janith Magith v. Krishnaswami*, (1954) 1 M.L.J. 451.

7. *Master v. Miller*, (1791) 100 E.R. 1042; *Cordwell v. Martin*, (1807) 107 E.R. 883; *Bathe v. Taylor*, (1812) 104 E.R. 1042; *Govindasami v. Kuppusami*, (1889) 12 Mad. 239; *Namdev Jayram v. Swadeshi Vyapari Mandali, Ltd.*, A.I.R. 1926 Bom. 491 : 98 I.C. 721, *Gomti v. Meghraj*, A.I.R. 1933 All. 443.

8. *Namdev Jayram v. Swadeshi Vyapari*, A.I.R. 1926 Bom. 491 : 98 I.C. 721.

evidence to prove the debt though the period of limitation as reckoned from 11 September had not expired.¹ In some particular case, however, the alteration of the date of execution of a deed may not be material.² If time is extended on the acceptor asking for extension of time for payment and remarks made to that effect on the bill, the original bill is not thereby discharged and the remarks do not amount to a material alteration. Nor does a second instrument chargeable with fresh stamp duty emerges therefrom.³

Alterations of the sums payable⁴ or of a rate of interest chargeable⁵ are material. The nature of the instrument will determine whether alteration of place of payment will be material.⁶ Alteration in statement of consideration may be material.⁷ Alteration in names of executants is material.⁸ The alteration of the Christian names of one party was held not to avoid a deed.⁹ Where a plaintiff had fraudulently altered the terms of a mortgage prior to its registration, his suit was dismissed.¹⁰ Where an alteration gave a man a right of action which he otherwise would not have, it was a material alteration.¹¹ In suits for bond debts brought on the basis of altered documents the plaintiff was not entitled to succeed. A material alteration destroyed the right of action on the document.¹² A deed of mortgage will be invalid by reason of subsequent alterations made in it. The admission in the deed may however be referred to for proving the original debt and the circumstances in which the original debt was contracted, and the plaintiff can recover upon the original consideration.¹³ The forged thumb-mark of one of the supposed executants, is a material alteration in a bond affecting the integrity and identity thereof and renders it unenforceable.¹⁴

1. *Govindasami v. Kuppusami*, (1889) 12 Mad. 239.

2. *Nathu Lal v. Gontli Kour*, A.I.R. 1940 P.C. 160.

3. *H. Pestonji & Co. v. Cox & Co.*, A.I.R. 1928 P.C. 213, affirming *Cox & Co. v. H. Pestonji & Co.*, A.I.R. 1927 Bom. 13, and overruling *International Banking Corporation v. H. Pestonji & Co.*, A.I.R. 1925 Bom. 187.

4. *Schulfield v. Londsborough*, [1894] 2 Q.B. 660; *Pandurang v. Kishan*, A.I.R. 1923 Nagpur 295; 74 I.C. 20; *Maung Myo v. Ma Myin*, A.I.R. 1928 Rang. 263; 114 I.C. 289.

5. *Sutton v. Toomer*, (1827) 108 E.R. 778; *Oodeychand v. Baskar*, (1882) 6 Bom. 317; 6 I.J. 523; *Tribeni v. Sahu*, A.I.R. 1919 Low. Bur. 45; 50 I.C. 517; *Parbati v. Amarendra*, 53 Cal. 418; A.I.R. 1926 Cal. 831; 96 I.C. 97; *Maung Myo v. Ma Myin*, 1928 Rang. 263; 114 I.C. 289.

6. *Walter v. Cubley*, (1833) 149 E.R. 711.

7. *Knill v. Williams*, (1809) 103 E.R. 839.

8. *Clark v. Blackstoc*, (1816) 17 R.R. 667; *London and Brighton Ry. Co. v. G. F. Fairclugh*, (1841) 133 E.R. 216; *Gardner v. Walsh*, (1855) 119 E.R. 412; *Gour v. Prasanna*, (1906) 33 Cal. 812; 3 C.L.J. 363.

9. *Re Howgate & Osborn's Contract* (1902) 1 Ch. 451.

10. *Christacharlu v. Karibasayya*, (F.B.), (1886) 9 Mad. 399.

11. *Lakshammal v. Narasimharaghava*, A.I.R. 1915 Mad. 284.

12. *Pandurang v. Kishan*, A.I.R. 1923 Nag. 295; *Christacharlu v. Karibasayya*, (F.B.), (1886) 9 Mad. 399; *Ganga Ram v. Chandan Singh*, (1882) 4 All. 62; *Kameswararao v. Hemalthammarao*, A.I.R. 1959 Andh. 596.

13. *Parbati v. Amarendra*, A.I.R. 1926 Cal. 831.

14. *Mahila Bai v. Ram Singh*, A.I.R. 1954 M.B. 31.

Immaterial alterations do not affect a new and second document. The correction of a mere clerical error is no material alteration.¹ Thus, the date of a deed may well be filled in after execution; for a deed takes effect from the date of execution; and is quite good, though it is undated. So, also the names of the occupiers of land conveyed may be inserted in a deed after its execution, where the property assured was sufficiently ascertained without them.² It is thought, says Halsbury,³ that where the description contained in the deed is such that it is essential to have the occupiers' names in order to ascertain what is intended to be conveyed, the addition of such names, after execution would be a material alteration. It also appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written,⁴ or which carries out the intention of the parties already apparent on the face of the deed,⁵ provided that the alteration does not otherwise prejudice the party liable thereunder. An alteration made in a deed may be material as against some party or parties thereto but immaterial as against the other or others;⁶ and where such an alteration has been made in a deed, any agreement contained therein may be enforced against the party or parties as to whom the alteration is immaterial (if originally liable thereunder) in the same manner as if the deed had remained unaltered.⁷

A material alteration may be effected in an instrument by or at the instance of the party or parties entitled thereunder or by or at the instance of the party or parties liable thereunder or by a third party. This may be done voluntarily or innocently or even accidentally. Any change in an instrument, which causes it to speak a different language in legal effect, from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms, or the relation of the parties to it, is an alteration which will invalidate it against all parties not consenting to the alteration. It will be of no consequence whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract.⁸ If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the

1. *In the matter of Jajodia Cotton Mills Ltd.* A.I.R. 1927 Cal. 612 : 103 I.C. 629 ; *Anirudhan v. Thonco's Bank, Ltd.* A.I.R. 1963 S.C. 746.

2. *Keane v. Smallbone*, (1855) 17 C.B. 179 ; *Adsetts v. Hives*, (1863) 33 Beav. 52 ; *Bishop of Crediton v. Bishop of Exeter*, [1905] 2 Ch. 455.

3. *Laws of England*, 3rd edn., vol. 11 (1955), para. 604.

4. *Waugh v. Bussell*, (1814) 5 Taunt. 707 ; *Aldous v. Cornwell*, (1868) R.R. 3 Q.B. 573.

5. *Adsetts v. Hives*, (1863) 33 Beav. 52.

6. *Doe d. Lewis v. Bingham*, (1821) 4 B. & Ald. 672.

7. *Hall v. Chandless*, (1827) 4 Bing. 123.

8. *Gour Chandra v. Prasanna Kumar*, (1906) 33 Cal. 812.

party or parties liable thereunder, the deed is thereby made void.¹ The avoidance, however, is not *ab initio*, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made.² The avoidance of the deed not being retrospective, the estate or interest in property which had passed by the deed, is not re-vested or reconveyed. The deed may, therefore, be put in evidence to prove that that estate or interest so passed, or for any other purpose than to maintain an action to enforce some agreement therein contained.³ It may be put in evidence to prove that before it was cancelled it operated as a conveyance of some estate or interest in property. If the alteration of the deed has been made with the necessary consent, the deed is not avoided thereby.⁴ If such an alteration make it in effect a new and second instrument it must be re-stamped.⁵ Where, again, a deed is altered or defaced by, or by the directions of a person subject to some liability thereunder, without the consent of the person entitled thereunder, the latter may, nevertheless, enforce that liability against him.⁶ If after the execution of a deed it is intentionally altered in some material part by a stranger (one who is neither a party or entitled thereunder), that alteration has the same effect exactly, as against a person entitled under and having the custody of the deed, as an alteration made by that person himself, notwithstanding that the alteration was made without his consent.⁷ This has been the law in order to require people to preserve documents in their custody at their own risk and peril. A person entitled under and in possession of a deed ought to be precluded from asserting that an alteration made therein by a clerk, servant, or agent entrusted by him with the custody of the deed was made without his authority. The case, however, where a stranger, wrongfully and without the knowledge and against the will of the person entitled under and in possession of a deed, obtains access to and materially alters the deed appears to be different.⁸ A material alteration made in a document by a stranger while it is in the possession of a party cannot disentitle that party from relying upon it when the

1. *Downes v. Richardson*, (1822) 106 E.R. 1337; *Stuffel v. Bank of England*, (1882) 9 Q.B.D. 555; *Joharmal v. Behari Lal*, (1936) 14 Rang. 29; Halsbury: *Laws of England*, 3d edn., vol. 11 (1955), para. 599.

2. Halsbury: *Laws of England*, 3d edn., vol. 11 (1955), para. 599.

3. *Nathu Lal v. Gomti Kurar*, (1940) All. 625; A.I.R. 1940 P.C. 160; (1940) Kar. 287; 990 I.C. 135; Halsbury: *Laws of England*, 3d edn., vol. 11 (1955) paragraphs 593, 599, 601.

4. *Downes v. Richardson*, (1882) 106 E.R. 1337; *Joharmal Beharilal v. Chettyar Firm*, (1936) 14 Rang. 29; Halsbury: *Laws of England*, 3d edn. vol. 11 (1955), para. 601.

5. *Tribeni v. Sahu*, A.I.R. 1919 Low. Bur. 45; 50 I.C. 517; *Maung Myo v. Ma Myin*, A.I.R. 1928 Rang. 263; Halsbury: *Laws of England*, 3d edn., vol. 11 (1955), para. 601.

6. Halsbury: *Laws of England*, 3d edn., vol. 11 (1955), para. 600.

7. *Ibid.*, para. 602.

8. *Ibid.*, in notes, (f), p. 369; *Kanchanlal v. Hariprasad*, A.I.R. 1951 Nag. 379.

alteration is made by the stranger fraudulently.¹ The right of the holder of a promissory note to sue is not affected by a material alteration in the instrument when the alteration has been made by a stranger without the consent of the holder and thus has been no fraud or laches on the part of the holder.² Where, again, a person entitled under a deed has not any present right to keep it in his custody (as where he is entitled on the death of some other person enjoying some interest or right thereunder for life and so in possession of the deed), a material alteration made without the former person's consent while the deed is in the latter person's possession will not prevent the former from putting the deed in evidence to enforce his rights thereunder.³ The case of accidental alteration of a deed is different. As it has been observed in Halsbury's *Laws of England*,⁴ if a deed is obliterated (wholly or partially) or defaced, or the seal is detached or destroyed by accident, without the agency of some responsible human being intending so to alter it (as in the case of damage done by accidental fire, animals, a child, or a person of unsound mind), this does not now avoid it or preclude its being given in evidence for any purpose; and if a deed is damaged in this manner so that its contents have become wholly or partially illegible, secondary evidence of what was written therein is admissible. It appears upon principle, Halsbury continues, that if damage of the kind mentioned is done to a deed by some human being inadvertently and unintentionally, this will not at the present day, (equity being preferred to strict law), avoid the deed in any way or preclude its being put in evidence, even though the damage was done by the person entitled under and having the custody of the deed.

Where the plaintiff sues on a defective hand-note, the hand-note failing, he is entitled, under Section 62, to sue on the loan itself, but he cannot do so without amending the plaint.⁵

An alteration to be material for the purpose of registration must affect the legal effect of the contract so as to make it cease to be the same instrument.⁶ A material alteration of a document by a party to it after its execution without the consent of the other party renders it void. This rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability. Thus a written acknowledgement of his liability by a debtor which is intended merely to save the bar of limitation and not to give a right of action is not within the rule.⁷ Authorities discriminate between cases in which the altered document is the foundation of the claim and those in which it is only used

1. *Kanchantal v. Hariprasad*, A.I.R. 1951 Nag. 379.

2. *Gourochandro v. Krushna charana*, A.I.R. 1941 Mad. 383.

3. Halsbury: *Laws of England*, 3d edn., vol. 11 (1955), para. 602.

4. *Ibid.*, 3d edn., vol. 11 (1955), para. 603.

5. *Lingam v. Punia*, A.I.R. 1959 Orissa 176.

6. *Abdool Hoosein v. Goolam Hoosein*, (1906) 30 Bom. 304.

7. *Atmaram v. Umedram*, (1901) 25 Bom. 616; *Gomti v. Meghraj*, A.I.R. 1933 All. 443.

as evidence.¹ In an action on an attested instrument not required by law to be attested, the obligee, while the instrument was in his possession and custody, got another attesting signature added to it by a man who had not, in fact, witnessed the execution of it by the obligor. *Held*, that although the alteration did not vary the contract, it was material in the sense of stating a falsehood, either expressly or by implication, by way of increasing the apparent evidence of its genuineness, and that the obligee could not sue upon it.² The fact that the signature of an attesting witness has been affixed to a bond after execution is not a material alteration and does not make the bond void.³ An alteration in order to be material must be either something which appears to be attested by the signature or something which alters the character of the instrument.⁴ A material alteration in a bond is, if fraudulently made, sufficient to render the bond void.⁵ Where, after a bond had been executed by the first defendant and delivered to the plaintiff, the name of the second defendant was added as an executant without any authority from him and without the assent of the first defendant, the alteration vitiated the bond against the first defendant. The plaintiff was not entitled to succeed on the basis of the original consideration and to rely on the altered bond as proof of acknowledgment.⁶ An alteration in a document which has the effect of enabling the payee to sue on the document in a court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document.⁷ If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to damages for breach of contract, but is entitled to a repayment of the advance made by him.⁸ After the bond had come into the hands of the plaintiff, the name of defendant No. 1 had been added as that of an attesting witness, and this was a forgery. The plaintiff was not precluded from recovering by reason of this alteration in the bond sued on.⁹ In *Christachari v. Karibasaya* (1886) 9 Mad. 399, a full bench decision, where a material alteration vitiated the document, the plaintiff was not allowed to amend the plaint and recover according to the terms of the instrument as it was actually executed. C, under a power given to her by the will of her husband, sold certain land to R. After the sale, certain forged attestations were added to the will. R's title could not be affected by the forgery.¹⁰ In *Mangal Sen v. Shankar Suhai*, (1903) 25 All. 580, a full

1. *Harendra v. Uma Charan*, (1904-5) 9 C.W.N. 695.

2. *Sitaram Krishna v. Daji Devaji*, (1883) 7 Bom. 418.

3. *Venkatesh v. Subraya*, (1891) 15 Bom. 44.

4. *Ede v. Kanto Nath*, (1878) 3 Cal. 220.

5. *Gogun Chunder v. Dhuronidhur*, (1881) 7 Cal. 616.

6. *Gour Chandra v. Prasanna Kumar*, (1906) 33 Cal. 812.

7. *Lakshammal v. Narasimharaghava*, (1915) 38 Mad. 746.

8. *Anantha Rao v. Surayya*, (1920) 43 Mad. 703.

9. *Ramayyar v. Shanmugam*, (1892) 15 Mad. 70 : *Ramaier v. Shanmugam*, (1892) 2 M.L.J. 39, (see the doubt raised by Shephard, J.).

10. *Paramma v. Ramchandra*, (1884) 7 Mad. 302.

bench decision, a prior mortgage bond, when produced in Court, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased. Held, that such alteration did not render the instrument void *in toto* so as to justify a Court in ignoring its existence and passing a decree in favour of the puisne mortgagee as the plaintiff for the sale of the property comprised in it without payment of the amount due under it, or any part of that amount. An interest in immovable property having become vested by the operation of the mortgage bond, that instrument was admissible in evidence on behalf of the mortgagee to show the estate which passed under it. (Aikman, J., *dissentiente*). Where the common intention of the parties was that a given bill should be treated as D. P. (i. e. documents against acceptance), a material alteration made in London without the consent and confirmation of the defendant made it impossible for the plaintiff to recover.¹ Even if a promissory note was a forgery, the plaintiffs would succeed if they could prove the loan by independent evidence.² Where a sale of movables was reduced to writing but the writing was altered by the plaintiff by the insertion of a clause excepting a claim on a former account, it was held in an action by the plaintiff upon the writing for the recovery of the price, that the alteration was not material so as to defeat the plaintiff's claim.³

If the bought and sold notes show a material variation neither of them nor both of them taken together can be relied upon for the purpose of proving the terms of the contract.⁴ In *John Cowie v. William Remfry*⁵ the transaction was one of bought and sold notes, and the circumstances attending C's alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; there having been a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. In *Ah Shain Shoke v. Moothia Chetty*⁶ in an action for not taking delivery of paduy it appeared that the bought note signed by the appellants contained the term—expressed in Chinese—which the respondents did not understand—that there should be no yellow grains, whilst the sold note signed by the respondents did not contain it. If the respondents did not assent to this term there was no contract. In *Sieverwright v. Archibald*⁷ the variance between the bought and sold notes was material, neither there was any evidence of a ratification of the contract. Variation of the formal agreement to the disadvantage of one of the parties should

1. *Mesha Ahronel v. National Bank of India, Ltd.*, (1903) 5 Bom. L.R. 524.

2. *Moti Lal v. Monmohan*, (1900-01) 5 C.W.N. 56.

3. *Govindasani v. Kuppusami*, (1893) 3 M.L.J. 266.

4. *Radhakrishna v. Tayeballi*, A.I.R. 1962 S.C. 538.

5. *Cowie v. Remfry*, (1841-46) 3 Moo. I.A. 448 P.C.

6. *Ah Shain Shoke v. Moothia Chetty*, (1899-1900) 27 I.A. 30 P.C. : (1900) 27 Cal. 403 P.C.

7. *Sieverwright v. Archibald*, (1851) 17 Q.B. 103 : (1851) 111 E.R. 1221 (*per* Campbell G.J. and Patteson and Wightman, Js.).

certainly be signed or otherwise proved to have been accepted by him in an unmistakable manner.¹

Rights and liabilities of third party to contract.—A contract can only arise if there is the *animus contrahendi* between the parties. Under the English law, only a person who is a party to a contract can sue on it. The English law knows nothing of a *jus quaesitum tertio* arising by way of contract.² It has been said in the House of Lords that it is a principle of English law that, apart from special considerations of agency, trust, assignment or statute, a person who is not a party to a contract cannot enforce or rely for protection on its provisions. To this principle there is no exception.³

Apart from the incidents of transfers and contracts under special statutory law governing transfer of property it can be said that as a rule a contract confers rights and imposes liabilities upon the parties thereto and not upon strangers. Unlike the case of land, a restrictive condition imposed upon a chattel at the time of its sale will not be binding on its future owners.⁴ Such a condition does not run with goods and cannot be imposed upon them. Subsequent purchasers, therefore, do not take them subject to any conditions. Though it is not true as a general proposition that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant,⁵ the case of a ship under a charterparty stands on a different footing. Thus if a shipowner charters his ship to a charterer, the latter will be entitled to an injunction in his favour restraining the shipowner or a mortgagee, transferee or purchaser from him from employing the ship in a way not consistent with the charterparty where the mortgagee, transferee or purchaser had had notice of the charterer's right.⁶

Privity of contract.—The English 'privity' has been adopted from the French 'prive', meaning having a participation in some act, so as to be bound thereby.⁷ As distinguished from a party, a privy "signifies him that is partaker, or hath an interest, in any action or thing (Cowel); but a person who has a privity of contract is hardly distinguishable from one who is a party to the contract, for it is a 'personal privity'".⁸ Facts of the case will determine

1. *Indore Malwa United Mills Ltd. v. Ramkaran*, A.I.R. 1963 M.P. 197.

2. *Dunlop v. Selfridge*, [1915] A.C. 847, 853; *Alice Marie Vandepitte v. Preferred Accident Insurance Co.*, A.I.R. 1933 P.C. 11.

3. *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1 H.L. See also under S. 151, *post*.

4. *Taddy and Co. v. Sterions & Co.*, [1947] 1 Ch. 354; *McGruther v. Pitcher*, [1904] 2 Ch. 306.

5. *London County Council v. Allen*, [1914] 3 K.B. 642, 658.

6. *Lord Strathcona S. S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E.R. 483.

7. Wharton: *Law Lexicon*, 14th Edn., 1953, 803.

8. *Bagot Co. v. Clipper Co.*, [1901] 1 Ch. 196; [1902] 1 Ch. 146; Stroud: *Judicial Dictionary*, 3rd Edn., 1953, vol. 3, 2306.

the privity of contract.¹ A licence for a liquor shop was obtained by *A* and a certain sum was at *A*'s request deposited by *B* as security for the licence. Subsequently *A* took *C* as partner in the shop. Government forfeited certain sum of arrears of licence fee out of the amount deposited by *B*. *B* sued *A* and *C* for recovery of that amount. It was held that *A* was liable but not *C* as there was no privity of contract between *B* and *C* and no equity in favour of *B* as against *C*.²

The idea of bargain being the foundation of the English conception of a contract, only the parties to the bargain can ordinarily, under the English law, be entitled to or bound by the terms of the contract. Reciprocal obligations are taken as the basis of the reciprocal rights as between the parties to the bargain. When, however, one of the apparent parties acts as the agent of a third person, that person is taken as a party to the contract. Apart from the conception of agency, a person not a party to a contract is not allowed, under the English law, to avail himself of such contract. *H* owes a sum of money to *C*. For a sufficient consideration moving from *H*, *R* promises to *H* that he will discharge his debt due to *C*. *C* not being a party to the contract between *R* and *H* cannot avail himself of the said contract. *C* being a third party to the said contract, can neither be liable or entitled under it.³

A person who is not a party to a contract or who has not furnished consideration may not sue upon it at English common law even if he is intended to be the beneficiary.⁴

This position of a stranger to a contract under the English common law could not, however, continue unaltered. The needs for justice, in a particular class of cases, persuaded the judges concerned to allow, in given circumstances, a third party to benefit from a contract to which he was a stranger. Thus it has been held in equity that a party to a contract may constitute himself a trustee for a third party to a right under the contract and thus confer an equitable right upon such third party. An action to enforce this right should be in the name of the trustee; but if he refuses to sue, the beneficiary may himself sue, joining the trustee as a defendant. The existence of such a trust depends, however, upon the intention of the parties and the circumstances of each case, and an unequivocal intention to constitute the trust must be proved.⁵

1. *Nehal Singh v. Fateh Chand*, (1922) 20 A.L.J. 708; *Shiv Dayal v. Union of India*, A.I.R. 1963 Punj. 538; *Wells (Merstham) Ltd. v. Buckland Sand Co. Ltd.*, [1964] 1 All E.R. 41 Q.B.D.; *Jayagopal v. Puri Joint Water Works Committee*, A.I.R. 1964 Orissa 69.

2. *Pheku Ram v. Ganga Prasad*, A.I.R. 1940 All. 98.

3. *Crow v. Rogers*, (1724) 1 Stra. 592; *Price v. Easton*, (1833), 4 B. & Ad. 433.

4. *Tweddle v. Atkinson*, (1861), 1 B. and S. 393; 121 E.R. 762; *Dunlop v. Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*, [1915] A.C. 847; *Scruttons, Ltd. v. Midland Silicones, Ltd.*, [1962] 1 All E.R. 1 H.L.

5. *In re Flavell, Murray v. Flavell*, (1883), 25 Ch. D. 89; *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70.

Statutory provisions have also been made in England with the object of giving relief to third parties. The legitimate interests of third parties as well as national interests of the British public have been kept in view in these legislations. Thus the English Marine Insurance, Act, 1906, the Law of Property Act, 1925, and the Road Traffic Act, 1930, for example, by statutory provisions, enable third parties to benefit from contracts entered into by others. Section 56 of the English Law of Property Act, 1925, lays down:

"A person may take immediate or other interest in land or other property or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party, to the conveyance or other instrument."

Section 25 (1) of the English Restrictive Trade Practices Act, 1956, provides:

"Where goods are sold by a supplier subject to a condition as to the price at which these goods may be resold, either generally or by, or to, a specified class or person, that condition may be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."

While, therefore, it is still the general principle of the English common law that a third party may not sue or be sued upon a contract, Section 25 (1) of the Act of 1956 removes this disability in the case of the retail price maintenance agreement which falls within the terms of the sub-section. The facts of *Dunlop v. Selfridge*¹, and *McGruther v. Pitcher*² would now be, in England, covered by Section 25 (1) of the Restrictive Trade Practices Act, 1956. The view held in *McGruther v. Pitcher*, to the effect that a restrictive condition as to price may not be imposed upon goods at the time of their sale so as to bind subsequent purchasers either at common law or in equity, even if they take notice of the condition, will not govern an agreement similar to that in *McGruther v. Pitcher*. Such an agreement will be now governed in England by Section 25 (1) of the Restrictive Trade Practices Act, 1956. The principles of law enunciated in the above-mentioned leading cases continue to be operative where there has been no statutory provisions governing a particular fact-situation.

The rigours of the English rule of *no jus quaesitum tertio* in English law of contract have been and can be mitigated only by the force of common law itself, equity, and statute.³

Because of judge-made law as well as statutory provisions now it can be said that there is nothing novel about the idea of a third party coming to enforce a contract either as an undisclosed principal or as a beneficiary.⁴ The

1. [1915] A.C. 847.

2. [1904] 2 Ch. 306.

3. See *Adler v. Dickson*, [1955] 1 K.B. 158; *Midland Silicones v. Scrutton*, [1961] 1 Q.B. 106. See Hanbury, *Modern Equity*, 8th Ed., 1962, 64-68.

4. *Dutton v. Poole*, (1678) 2 Lev. 210; 1 Ventr. 318: *Affirmed on error* Exch. Ch., T. Raym. 302.

recognition of a third party's right is very familiar in mercantile contracts. This recognition is constantly invoked where the property in the subject-matter of the contract is likely to be transferred during the currency of the contract. In England, in marine insurance the policy is always expressly taken out for the benefit of those to whom the property does, may or will appertain. A third party has thus been allowed to take those benefits of a contract which appertain to his interest therein, though he has to take them subject to whatever qualifications with regards to them the contract may have imposed.¹ The third party has been allowed, in certain given cases, to benefit from the contract as if the contract was a tripartite one. Apart from the exigencies of trade and commerce, from quite an early time the conception of trust was evolved in order to entitle a third party to benefit from a given contract and in given circumstances. Thus, where a person derived an equitable right through the mediation of another's agreement, he could benefit from that agreement though himself a stranger to it. *P* owes money to *G* and *W*. *P* agrees with *W* to assign a property to him for the consideration that he pays the debt due to *G*. In equity *G* and *P* can compel *W* to perform his promise. *P* will be regarded as the trustee for *G*, and thus *G* as the beneficiary will be allowed to recover his due from *W*.² It has also been an established rule that, where a contract is made with *A* for the benefit of *B*, *A* can sue on the contract for the benefit of *B* and recover all that *B* could have recovered if the contract had been made with *B* himself. Consequentially, *B* can also recover the benefit by making *A* and the other party as defendants.³

The concept of trust though applied both in England and in India for the relief of a third party to a contract has not been capable of any precise definition. Both in India and in England for the applicability of the doctrine of constructive trust a reference to a judicial decision becomes, consequently, imperative. A few English references are given below.⁴ For Indian cases see the illustrations given below.

'*Jus tertii*' means the right or title of a third person. In Scots Law normally, a *tertius* has no title to enforce a contract even though he may

1. *Pyrene Co., Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 2 Q.B. 402; [1954] 2 All E.R. 158; *Elder Dempster & Co. v. Paterson Zochonis & Co.*, [1924] A.C. 522; *Les Affreteurs Reunis Societe Anonyme v. Walford*, [1919] A.C. 801.

2. *Gregory and Parker v. Williams*, (1817), 3 Mer. 582; *Les Affreteurs Reunis Societe Anonyme v. Walford*, [1919] A.C. 801; *Harmer v. Armstrong*, [1934] 1 Ch. 65.

3. *Lloyd's v. Harper*, (1880) 16 Ch. D. 290.

4. *Re Flavell, Murray v. Flavell*, (1883) 25 Ch. D. 89; *Gandy v. Gandy*, (1885) 30 Ch. D. 57; *Royal Exchange Assurance v. Hope*, [1928] Ch. 179; *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70; *Re Stapleton—Bretherton. Weld—Blundell v. Stapleton—Bretherton*, [1941] Ch. 482; [1941] 3 All E.R. 5; *Re Schebsman. Official Receiver v. Cargo Superintendents (London), Ltd. and Schebsman*, [1944] Ch. 83; (1943) 2 All E.R. 768; *Re Miller's Agreement Uniacke v. Attorney-General*, [1947] Ch. 615; [1947] 2 All E.R. 78; *Colyear v. Countess of Mulgrave*, (1836) 2 Keen 81; *Prudential Staff Union v. Hall*, [1947] K.B. 685; *Fletcher v. Fletcher*, (1844) 4 Hare. 67; *Gregory & Parker v. Williams*, (1817), 3 Mer. 582; *Les Affreteurs Reunis v. Walford*, [1919] A.C. 801; *Harmer v. Armstrong*, [1934] Ch. 65.

have an interest that it is carried out. But when a contract shows that the object of the parties to it was to advance the interests of a *tertius*, and *tertius* is named, then a *jus quaesitum tertio* is created which gives the *tertius* a title to sue.¹

In *Dutton & Wife v. Poole*, (1677) 2 Lev. 210 : 1 Vent. 318, affirmed on error Exch. Ch., T. Raym. 302, a tenant in fee simple being about to cut down timber to raise a portion for his daughter, the defendant his heir-at-law, in consideration of his forbearing to fell it, promised the father to pay a sum of money to the daughter, and an action of assumpsit by the daughter and her husband was held to be well brought. See 83 E.R. 523.

A company can ratify a contract made on its behalf by its agents before it came into existence.² If the promisor, who could not be compelled to pay the third party, nevertheless chooses to do so, the promisee or his representatives cannot complain.³

For a wrongful dishonour of cheque the drawee is liable for damages only to drawer and not to the payee.⁴

Where the insurance is effected by the carriers for the benefit of the owner, the latter can enforce the contract of insurance.⁵ In India judicial pronouncements have varied as to the rights of a third party to a contract. Judges in general have followed the uncertain path of the English common and equity law principles of contract. The Indian Contract Act, 1872, has been taken as exhaustive so far as it goes. Where, however, the Act is silent, the Courts in India have generally tended to follow the day-to-day decisions of English Courts governing like fact-situations. A few Judges in India, on the other hand, instead of following the uncertain path of English common and equity law, have taken upon themselves the application of the principle that where there is no bar there is freedom. The Indian Contract Act not forbidding the Court to do justice to a third party to a contract, some of the judges in India have availed themselves of the principles of equity, justice and good conscience and allowed relief to the third party where a contract has been made for the benefit of such third party. According to these learned judges, the definition of consideration in Section 2 (d) of the Indian Contract Act, 1872, is wider than in English common law, and there is nothing in the Indian Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others, which contains

1. Wharton : *Law Lexicon*, 14th Ed., 1953, 551. *Meghli Malsee Ltd. v. P. C. Oommen*, A.I.R. 1963 Ker. 306.

2. *Touche v. Metropolitan Warehousing Co.*, (1871) L.R. 6 Ch. 671 ; see *Re Empress Engineering Co.*, (1880) 16 Ch. D. 125 (*per* Jessel M. R.) ; *Re Rotherham Alum and Chemical Co.*, (1883) 25 Ch. D. 103, 111 (*per* Jessel, M. R.).

3. *Green v. Russell*, [1959] 2 Q.B. 226 ; *Re Stapleton—Bretherton* [1941] Ch. 482. *Re Schebsman* [1944] Ch. 83.

4. *Jagjivan Manji v. Ranchhoddas Meghji*, A.I.R. 1954 S.C. 554, 556 : [1955] S.C.R. 503. *Meghji Malsee Ltd. v. P. C. Oommen*, A.I.R. 1963 Ker. 306.

5. *Snow White Food Product Pvt. Ltd. v. Sohanlal*, A.I.R. 1964 Cal. 209.

a provision for his benefit. Their Lordships have observed that there is ample authority for saying that the administration of the law of contract in India is not affected by the doctrine laid down in *Tweddle v. Atkinson*,¹ that only a person who is a party to the contract can sue upon it. In consonance with the ancient traditions of India, their Lordships have sought to do complete justice in one suit. They have also observed that in the *mofussil* courts of India the rights of parties are to be determined according to general principles of justice, equity and good conscience, without any distinction, as in England, between partial justice which was administered in courts of law and the more full and complete justice, for which it was frequently necessary to seek the assistance of a court of equity. The expansion of the equitable concept of a trust to enable a third party to enforce a contract made between others is an instance of the growth of law by means of fiction. Whatever may have been the necessity in England, whether historical, procedural or otherwise, for making use of such fictions, there seems to be no similar necessity for importing these anomalies into India. This was the view held in *Kshirodebihari v. Mangobinda Panda*,² and a few other decisions.³ Their Lordships in *Kshirodebihari v. Mangobinda*, while holding the above view dissented from a number of decisions.⁴ In *Kshirodebihari v. Mangobinda*, it was held that a zemindar could sue upon a contract made between his *mokarraridar* and *darmokarraridar*, whereby the latter undertook to pay the *mokarraridar*'s rent direct to the zemindar; and that the zemindar could obtain a decree for his rent direct against the *darmokarraridar*.

The Sixth Interim Report of the Law Reform Committee of England recommended, in effect, that the doctrine of *Lawrence v. Fox*, (1859) 6 N.Y. Ct. of App. 263, should be incorporated into English law.⁵

In the said case of New York Court of Appeals it was decided by a majority that an action lies on a promise made by the defendant upon valid consideration to a third person for the benefit of the plaintiff, though the plaintiff was not privy to the consideration. Such a promise is, if adopted by the plaintiff, to be deemed to have been made to him, though he was not even cognisant of it when made.⁶

As against this broad view in favour of the rights of a third party to a contract there is the generally accepted orthodox view that where on a contract between *A* and *B*, *B* agrees to pay a sum of money to *C* and no more circumstances appear, *C* being a stranger to the contract, cannot sue *B* for

1. 1 B. and S. 393 : 121 E.R. 762.

2. (1933) 61 Cal. 841 : A.I.R. 1934 Cal. 682 : 152 I.C. 351 : 38 C.W.N. 682.

3. *Debnarayan v. Chunilal*, (1913) 41 Cal. 137 ; *Muhammad Khan v. Husaini Begam*. (1910) 32 All. 410.

4. *Subbu Chetti v. Arunachalam*, (1929) 53 Mad. 270 ; *Jiban v. Nirupama*, (1926) 53 Cal. 922 ; *Krishna v. Pramila*, (1928) 55 Cal. 1315 ; *Jagadamba v. Bibhooti*, (1933) 60 Cal. 767 ; *Maghi Mal v. Darbara Singh*, (1933) 14 Lah. 675 ; see the illustrative cases, *post*.

5. See below. See also Hanbury, *Modern Equity*, 8th Ed., 1962, pp. 62-63.

6. Hanbury, *op. cit.*, 63.

extent of the application of the doctrine of privity to contract. Until the law is settled by the Supreme Court or the Legislature, precedents will continue to guide the parties, lawyers, and judges in India in their day-to-day interpretation of the extent of the rights of a third party to a contract. A few cases may, therefore, be given by way of illustrations of the applicability of the doctrine of privity.

A stranger to a contract can sue upon it at any rate in the following circumstances, namely, (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally, and (b) where the contract creates a trust in favour of the stranger.¹

A mere contract between two parties that one of them shall pay a certain sum to a third person, not a party to the contract, will not necessarily make that third person a *cestui que trust*, so as to found a suit for money against the obligor.²

To entitle a third person, not named as a party to the contract, to sue either of the contracting parties, that third person must possess an actual beneficiary right which places him in the position of *cestui que trust* under the contract. Whether a trust exists so as to give the third party a right to sue must depend upon the construction of the deed embodying the contract.³

B executed a bond on 13 January, 1928, in favour of *P* and a mortgage bond on 17 April, 1930, in favour of *H*. One of the conditions of this mortgage bond was that *H* was to pay *P* the sum of Rs. 2,500 due to him from *B*, but of that amount he paid *P* only Rs. 1,900 and the remaining Rs. 600 were paid in cash on that date to *B*. Next day, *B* executed the bond in *P*'s favour in respect of his due which consisted of his surviving liability under the bond dated 13 January 1928, and other debts. In the circumstances it was held that no trust had been created in *P*'s favour by the contract between *B* and *H*. *H* had not agreed to pay *P* direct and that he was not estopped from abjuring his liability on this point.⁴

Though clause (d) of Section 2 of the Contract Act widens the definition of "consideration" so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of *nudum pactum*, there is nothing in the said

1. *Daw Po v. U Po*, A.I.R. 1940 Rang. 91; *Debnarayan v. Chunilal*, 41 Cal. 137; A.I.R. 1914 Cal. 129; 20 I.C. 630; 18 C.L.J. 603; 17 C.W.N. 1143; *Subbu Chetti v. Arunachalam* (F.B.) 53 Mad. 270; A.I.R. 1930 Mad. 382; 124 I.C. 55; 58 M.L.J. 420; *Jagadamba v. Bibhootibhusan*, 60 Cal. 767; A.I.R. 1933 Cal. 407; 37 C.W.N. 447; *Venkata Chinnaya v. Venkataranya*, (1882) 4 Mad. 137.

2. *Jiban Krishna v. Nirupama*, 53 Cal. 922; A.I.R. 1926 Cal. 1009; 96 I.C. 846. *Ganesh Das v. Banto*, A.I.R. 1935 Lah. 354. *Panchanan v. Nirode*, A.I.R. 1962 Cal. 12.

3. *Rakhmabai v. Govind*, (1904) 6 Bom. L.R. 421. *Panchanan v. Nirode*, A.I.R. 1962 Cal. 12.

4. *Saraswatibai v. Haibatrao*, A.I.R. 1945 Nagpur 261.

Section to encourage the idea that contracts can be enforced in India by persons who are not parties thereto except where there is an obligation in equity amounting to a trust arising out of the contract.

A life assurance policy under which the amount of the policy is payable to the wife of the assured does not, by itself, apart from any statute, create any trust in favour of the wife. Money due under such a policy would not pass, on the death of the assured, to his wife, but would form part of the assets of the estate of the deceased. Though the wife was the nominee of the deceased, she was no party to the contract between the deceased and the insurance society.¹

A contract can only arise if there is the *animus contrahendi* between the parties. Where, therefore, *A* had no authority from *B* to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf, it is impossible to say that a contract existed between *B* and the insurance company, that is, it cannot be held that she was in law insured under the policy.

On equitable principles only a person who is a party to a contract can sue on it. The law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be enforced on a stranger to a contract *in personam*. But a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if however he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. In such cases, again, the intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words contained in a contract such as an insurance policy.

The idea of a person being the *cestui que trust* under the insurance contract is objectionable since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract, whereas in an insurance serious duties and obligations rest on any person claiming to be insured which necessarily involve consent and privity of contract.²

The wife as a nominee of the assured cannot enforce the payment of the insurance money.³ Unless a trust has been created in favour of the wife as nominee of the assured the insurance money is payable to the executors of the estate of the deceased assured.⁴

1. *Krishna v. Pramila*, (1928) 114 I.C. 658.

2. *Alice Marie Vandepitte v. Preferred Accident Insurance Co.*, A.I.R. 1933 P.C. 11 (a case from Canada) : 64 M.L.J. 133 : 143 I.C. 79.

3. *Shankar v. Umabai*, (1913) 37 Bom. 471.

4. *Palamba v. Krishnappa*, (1913) 37 Mad. 483.

Where a motor insurance contract contains a clause for reference of any dispute arising between the owner of the car and the company arising out of the policy to arbitration, a third person claiming damages against the company under the third party risk portion of the insurance contract cannot enforce the arbitration clause.¹ A motor insurance policy does not remain in force if there is a change of ownership of the car insured unless there is an agreement between the company and the new owner that the policy will remain in force.

The articles of association constitute a contract between the company and a member in respect of his rights as a member. The articles do not constitute a contract between the company and third persons, and a third person who purports to have rights against the company will be precluded from relying on the articles as the basis of his claim and must prove a special contract in his favour.²

There was an agreement between the appellant and the Government in regard to the administration of the forests of the appellant's Raj and the selection and appointment of the Forest Officer by the Government. The respondent was appointed Forest Officer by the Government and his services were placed under the appellant according to the terms of the agreement. The taking over of the forest having been denotified, the services of the respondent were terminated. Thereupon the respondent instituted a suit against the appellant to recover two months' salary which was in arrears. It was held that there having been no privity of contract between the appellant and the respondent the latter was not entitled to get a decree against the appellant for his salary on the basis of the agreement.³

Father and son mortgaged joint family property. Mortgagees obtained execution of the decree on the mortgage. Arrangements were made at a gathering of mortgagees' representative and the family of the mortgagors for sale of mortgaged properties and certain others by the mortgagors to the mortgagees. At the negotiations the mortgagor son's wife was present and demanded that a particular bungalow, that is, a particular item of the mortgaged property should be transferred to her when demanded. To this demand of the son's wife the mortgagees agreed on condition that she paid the expenses for reconveyance. To the said effect letters were also exchanged between the mortgagors and the mortgagees. The son's wife was put in possession of the house. The taxes paid by the mortgagees were recovered by them in cash from her or from her husband. She also spent a considerable amount of money in effecting improvements of the house. When she demanded a conveyance from the mortgagees, they declined to do so. As a

1. *Des Raj v. Concord of India Insurance Co.*, A.I.R. 1951 Punj. 114; *Krishnalal v. Pramilo*, 55 Cal. 1315; A.I.R. 1928 Cal. 518; *Alice Marie v. Preferred Accident Insurance Co.*, A.I.R. 1933 P.C. 11; 143 I.C. 79.

2. *Duraiswami v. United India Life Assurance Co.*, A.I.R. 1956 Madras 316.

3. *State of Bihar v. Charanjilal*, A.I.R. 1960 Patna 139.

promisee she was a party to the contract, and it was enforceable at her instance.¹

X borrowed money from *Y* and on a hand-note. *Y* then assigned the note to *S*. Thereafter *X* sold all his properties to *R*. The sale-deed recited that *R* undertook to pay the amount due on the handnote. *S* sued *R* on the hand-note impleading *X* and *Y*. *S* was not entitled to recover the amount from *R* as he was not a party to the contract, and the sale-deed did not create a trust in favour of *S*.²

A licence for a liquor shop was obtained by *A* and certain sum was at *A*'s request deposited by *B* as security for the licence. Subsequently *A* took *C* as partner in the shop. Government forfeited certain sum for arrears of licence-fee out of the amount deposited by *B*. *B* sued *A* and *C* for recovery of that amount. *A* was liable but not *C* as there was no privity of contract between *B* and *C* and no equity in favour of *B* as against *C*.³

Certain bank went into liquidation and the Official Liquidator took misfeasance proceedings against the manager of the Bank and in the course of these proceedings the manager effected a compromise with the Official Liquidator by which he undertook, among other things, "to adjust or satisfy any claim" of certain depositor of the Bank among others and to indemnify the Official Liquidator against any such claim. A decree was passed in terms of the compromise. The manager having made default in satisfying the claim of the depositor he instituted a suit against the manager. It was held that the Official Liquidator who entered into a compromise with the manager was representing all the depositors, creditors, and shareholders of the Bank and was in a way acting as their agent. The depositor thus was not a stranger, and his suit was, therefore, maintainable.⁴

A person not a party to the contract could not sue on the contract unless the case came within the recognised exceptions, e. g., a person not a party to the contract could sue on it if he was claiming through a party to the contract or was in the position of a *cestui que trust* or of a principal suing through an agent or if he claimed under a family settlement.⁵

A stranger to a contract which reserves a benefit for him cannot sue upon it though the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine. The first is where a contract

1. *Gorakhram v. Laxmibai*, A.I.R. 1953 S.C. 443.

2. *S. P. Ojha v. R. L. Singh*, (1946) 25 Pat. 269.

3. *Pekhu Ram v. Ganga Prasad*, A.I.R. 1940 All. 98 (A.I.R. 1938 All. 206 reversed).

4. *Surjan Singh v. Nanak Chand*, A.I.R. 1940 Lah. 471; *Chhangamal v. Dominion of India*, A.I.R. 1957 Bom. 276.

5. *Shamji Bhanji v. N. W. Rly.*, A.I.R. 1947 Bom. 169 (A.I.R. 1936 Bom. 344 relied on). *Hashmatmal v. Pribhdas*, A.I.R. 1929 Sind 117 : (1928) 114 I.C. 11; *Babu Ram v. Dhan Singh*, A.I.R. 1957 Punjab 169; *Chhangamal v. Dominion of India*, A.I.R. 1957 Bom. 276; *Veeramma v. Appayya*, A.I.R. 1957 Andhra 965; *Dan Kuer v. Sarla Devi*, (1946) All. 756 : A.I.R. 1947 P.C. 8; *Khwaja Muhammad v. Husaini Begam*, 32 All. 410; *Uma Nath v. Jang Bahadur*, A.I.R. 1928 P.C. 245; *National Petroleum Co. Ltd. v. Popatlal Mulji*, (1936) 60 Bom. 954.

between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party.¹

Where on a contract between *A* and *B*, *B* agrees to pay a sum of money to *C*, and no more circumstances appear, *C* being a stranger to the contract, cannot sue *B* for money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e. g. (a) where *B* afterwards agrees with *C* to pay him direct or becomes estopped from denying his liability to pay him personally; (b) where the contract between *A* and *B* creates a trust in favour of *C*; (c) where the contract charges the money to be paid out of some immovable property; or (d) where it is due to *C* under a marriage settlement, partition or other family arrangements.²

A person who is not a party to the contract cannot sue on it. Such rights can be conferred by way of property, as, for example, under a trust, or because of estoppel or by way of charge or under a family arrangement; but unless something over and beyond a mere contract can be inferred the suit will not lie.³ See also *Rapai v. John* A.I.R. 1965 Ker. 203.

Where the parties to a transaction themselves wish to uphold it, no stranger can challenge the transaction on the ground of want of consideration.⁴

The definition of consideration in Section 2 (d) of the Indian Contract Act gives a wider meaning to that term than is accepted in English law, because it includes consideration moving from the promisee or any other person. But the fact that a consideration may move from a third party does not involve the proposition that a third party can sue upon the contract.⁵

1. *Jnan Chandra v. Manoranjan*, (1944) 2 Cal. 576; A.I.R. 1942 Cal. 251; *Sudama v. Ram Kishun*, A.I.R. 1954 All. 348; *Devidas v. Birsingsing*, A.I.R. 1945 Nag. 231.

2. *Subbu Chetti v. Arunachalam (F.B.)*, 53 Mad. 270; 124 I.C. 55; A.I.R. 1930 Mad. 382; 58 M.L.J. 420; *Daw Po v. U Po*, A.I.R. 1940 Rang. 91; *Jamna Das v. Ram Autar*, 34 All. 63 P.C.; 39 I.A. 7 P.C.

3. *Bhabhootmal v. Moolchand*, A.I.R. 1943 Nagpur 266; *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd.*, 113 L.T. 386; 31 T.L.R. 399; [1915] A.C. 847; 84 L.J. K.B. 1680; *Jamna Das v. Ram Autar*, 34 All. 63 (P.C.); 13 I.C. 304; 39 I.A. 7; 9 A.L.J. 37; *Subbu Chetti v. Arunachalam*, 53 Mad. 270; A.I.R. 1930 Mad. 382; 124 I.C. 55; 58 M.L.J. 420; *Adharchandra v. Dolgovinda*, 63 Cal. 1172; 63 C.L.J. 287; 40 C.W.N. 1037; A.I.R. 1936 Cal. 663; *Ganeshdas v. Banto*, 16 Lah. 118; 37 P.L.R. 552; A.I.R. 1935 Lah. 354; 158 I.C. 387; *Mittar v. Datta Ram*, (1925) 24 A.L.J. 185, 205.

4. *Maroti Bansi v. Radhabai*, A.I.R. 1945 Nag. 60; *Sahaudra Bai v. Shri Deo Radha Ballabhji Mandir*, (1940) Nag. 94; A.I.R. 1938 Nag. 30; 176 I.C. 57; *Achal Ram v. Kazim Husain*, 27 All. 271; 32 I.A. 113; 8 O.C. 155; *Maung Din v. Ma Huin Me*, 3 Rang. 71; A.I.R. 1925 Rang. 227; 89 I.C. 436.

5. *National Petroleum Co. Ltd. v. Popatlal Mulli*, (1936) 60 Bom. 954; *Subbu Chetti v. Arunachalam (F.B.)*, (1929) 53 Mad. 270; *In re Manekji* (1931) 34 Bom. L.R. 728; *Malvankar v. Credit Bank*, (1914) 16 Bom. L.R. 733; *Krishna v. Pramila*, (1928) 114 I.C. 658.

A executed a hand-note in favour of *B*, and another hand-note in favour of *C*. *B* and *C* assigned the notes to *D*. Thereafter *A*, the executant of the notes, sold all his properties to *X* and *Y*. The sale deed contained a recital that *X* and *Y* undertook to pay the amount due on the hand-notes. This undertaking was not communicated to *D*. *D* brought a suit against *X* and *Y* for the recovery of the amount due on the hand-notes. It was held, that the suit was not maintainable as no trust was created in favour of *D*.¹ In the words of Shearer, J., this was not strictly speaking a case in which two persons had entered into a contract for the benefit of a third person. The recital in the sale deed amounted to a direction by *A* to *X* and *Y* to pay a certain sum to *B* and *C* instead of to himself. A direction of that kind would at any time have been revoked, and *X* and *Y* were in the position of mandatories and not of contractors or even trustees.²

A certain property was mortgaged entirely. The mortgagor sold certain portion of this property, and out of the sale consideration a certain amount was left with the vendee for payment to the mortgagee. The mortgagee brought a suit for sale on account of his mortgage. It was held that the vendee was not personally liable as the mortgagee was not a party to the contract between the mortgagor and the vendee for payment on account of mortgage. Held also that no trust was created in favour of mortgagee: and the mere fact that certain payments on account of interest were made by the purchasers to the mortgagee did not create a contract between the mortgagee and the purchaser to pay back the mortgage amount.³

Although a stranger to a contract cannot derive any benefit from a contract to which he is not a party, yet where as a result of a contract between two parties a trust comes into existence for the benefit of a third person, that third person is entitled to seek the benefit. Thus, where a sale deed specifically provided that a certain sum was placed in trust with the purchaser for payment to the mortgagee, but the purchaser did not pay it, and a suit was brought by the mortgagee, it was held, that the purchaser could not plead that the plaintiff was a stranger to the contract of sale, and therefore he was not entitled to receive any benefit from such a contract.⁴

Where in a partition of a family property, it has been stated in the award that the debts due by the father who received no property at the partition should be a charge on the immovable property which was taken by one of the sons, no trust is created in favour of the creditor. The case not being one of a family arrangement for the benefit of a female or a minor, a stranger to the award cannot enforce the same.⁵

The general rule in India is that although consideration for an agree-

1. *Achuta v. Jainandan*, 5 Pat. 468 : 96 I.C. 287 : A.I.R. 1926 Pat. 474.

2. *Suraj Prasad v. Ram Lal*, A.I.R. 1947 Pat. 131.

3. *Wali Uddin v. Thakur Ram*, A.I.R. 1936 Oudh 313.

4. *Desraj v. Balli Ram*, A.I.R. 1957 J. and K. 10.

5. *Nirmaldas v. Sumatbai*, A.I.R. 1943 Sind 221.

ment may proceed from a third party, a person not a party to an agreement cannot sue upon it.¹

A purchaser who retains money with him for payment to the mortgagee of the property purchased does not become a trustee for the mortgagee, and the mortgagee cannot enforce against the purchaser the undertaking entered into by him with the mortgagor.²

In a registered sale-deed the payment of an unsecured debt of Rs. 600, due from the vendor to a third party, was recited as part of the consideration. The vendee undertook to pay this debt. The third party was wholly ignorant of the sale. Can that third party subsequently recover the sum of Rs. 600 from the vendee on the strength of the recital in the sale-deed? It was held that in the present case, there being no trust created in favour of the plaintiff and he not being a party to the contract, the general rule applies, viz., that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit, and that the answer to the question referred must accordingly be in the negative.³

A sold his house to B under a registered sale-deed under the terms of which B was to pay a certain sum of money which was the balance of sale consideration left in his hands to A's creditor, C. Subsequently, B made part payments to C out of the consideration left in his hands informing C that they were in respect of the sale amount pertaining to the house and that the balance of the amount would be remitted immediately. B, however, failed to remit the remaining amount whereupon C sued B for recovery of the same. The suit was held maintainable on the ground that though originally there was no privity of contract between B and C, B having subsequently promised to pay the amount, C was entitled to bring a suit against B for recovery of the amount.⁴

Where in a partition of a joint family property by a compromise decree certain properties were given to certain branches to which also were allotted certain debts and it was further provided that until the said debts were fully discharged the properties allotted to the shares of the respective persons should be liable in the first instance, it amounted to a mere contract of indemnity between the parties, conferring no benefit of charge upon the creditors. A creditor who is not a party to the compromise cannot sue upon the contract unless he stands in the position of a *cestui que trust*.⁵

1. *Rijhunal v. Jan Mahomed*, A.I.R. 1943 Sind 190; *Tara Chand v. Abdul Razak*, (1939) Kar. 422; A.I.R. 1939 Sind 125; 182 I.C. 226; *National Petroleum Co. Ltd. v. Popatlal Mulji*, 60 Bom. 954; 38 Bom. L.R. 610; A.I.R. 1936 Bom. 344; 165 I.C. 338; *Gulabchand v. Luxminarayan*, (1944) Nagpur 46.

2. *Gajadhar v. Rishabhkumar*, A.I.R. 1949 Nag. 319; *Babu Ram v. Dhan Singh*, A.I.R. 1957 Punj. 169; *Ganesh Das v. Banto*, (1934) 16 Lah. 118; *Jamna Das v. Pandit Ram*, (1911) 39 I.A. 7.

3. *Ganesh Das v. Banto*, (1934) 16 Lah. 118.

4. *Devaraje v. Ramkrishniah*, A.I.R. 1952 Mysore 109.

5. *Suryanarayana v. Basivireddi*, A.I.R. 1932 Mad. 457.

Where a decree-holder has purchased the land in a court-sale in execution of his decree, he cannot be held to be bound by an agreement entered into by the father of the judgment-debtor with his collaterals relating to the limited nature of the title in the land. The agreement between the last two classes of persons is not binding on the third party who is not a party to it.¹

Where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement, he or she may sue in his or her own right to enforce it. Where a partition of the joint family property between the male members of a joint Hindu family is made by arbitrators and a charge for maintenance of a female member is created by the award over property allotted to certain male member, the female member though a stranger to the contract as embodied in the award can sue on it and enforce the charge.²

Two deeds were executed on same day: one by the father and both of his sons and the other by the elder son alone. By the first deed the father relinquished all his rights in all the property, movable and immovable, in favour of his elder son upon certain conditions and the elder son agreed to abide by those conditions. The younger son bound himself by this deed not to put forward a claim at any time for any property in consideration of his being declared owner of certain estate. By the second deed executed by the elder son alone, he in consideration of having been appointed his successor by his father in his life time and being put in possession of his entire estate, bound himself by certain conditions, namely, that the executant would pay certain sum to the illegitimate son of his father and that on the illegitimate son attaining majority, he would be put in possession of a certain village, or, failing that, of another village of same quality. It was held that the deeds formed one transaction and could be looked upon either as a gift or settlement or as a provision in a family arrangement or as a trust.

The meaning of a family is a wide one including illegitimate members and persons yet to be born. Therefore, a settlement making provision for illegitimate son can be regarded as family arrangement. Moreover, it is by no means necessary under the law that the provisions in a family settlement should be restricted to members of the family alone, and it is well settled that a stranger can take a benefit under the family arrangement.³

Very little will suffice in law to create a privity between a third person and the parties named in the contract so as to give the former a right to

1. *Tulsi Ram v. Bhag Singh*, A.I.R. 1957 Pepsu 21.

2. *Dan Kuer v. Sarla Devi*, A.I.R. 1947 P.C. 8; *Khwaja Muhammad v. Hussaini Begam*, (1910) 32 All. 410 (P.C.): (1910) 7 I.C. 237.

3. *Jang Bahadur v. Uma Nath*, A.I.R. 1937 Oudh 99; (1936) 12 Luck. 639; *Kashibai v. Tatyia*, 40 Bom. 668; A.I.R. 1916 Bom. 312; *Subbu Chetti v. Arunachalam*, 53 Mad. 270; A.I.R. 1930 Mad. 382; *Jagadamba v. Bibhooti*, 60 Cal. 767; A.I.R. 1933 Cal. 407; 37 C.W.N. 447.

sue the latter especially where it is so convenient for all parties that the matter should be carried out between the two parties really interested.¹

The principle that a person who is not a party to a contract cannot take advantage of its provisions is inapplicable to India. Lease money of the lease executed by *A* in favour of *B* when it is stated in the lease that the money be paid to *X* to whom *A* was indebted and to obtain receipts of payments made to *X* from time to time, cannot be attached in execution of a decree obtained by a third party against *A*; for *A* has divested himself of all interest in that amount, and under the instrument of lease *X* has become a beneficiary entitled to its benefit.²

The ordinary rule of law that a stranger to a contract though a beneficiary thereunder, could not sue upon it does not prevent a Court, in the exercise of its equitable jurisdiction, from passing a decree in his favour, when all the parties affected by the contract are before the Court. Where all parties are before Court and it is in a position to do complete justice, it can order the enforcement of a contract by a person in whose benefit it was made though he was not directly the promisee. Persons who are not actual parties to the agreement or engagement are entitled to sue for the benefit reserved to them under arrangements or engagements like family settlement or partition arrangements. But apart from that, where a Court has before it all persons and is in a position to do complete justice to the case, the suit should not fail on the ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf.³ Where in a contract entered into between *A* and *B*, *B* undertakes to pay *C* a debt due to him by *A*, *C* has got an equitable claim against *B*, and though not a party to the contract he can claim as a beneficiary under the contract and enforce it.⁴ Section 2 (i) of the Contract Act cannot be invoked as a clause importing the doctrine of mutuality into the law of contract in India.⁵

Under the ordinary law of contract, an agreement as such can be binding on and can be enforced only against those persons who are parties to it. All the principles of the ordinary law of contract are however not always applicable to industrial disputes. One of the principles sometimes made applicable to industrial disputes is the principle of collective bargaining. Thus special disputes may be made governable by special principles under the provisions of a special Act.⁶

Statutory obligations.—From time immemorial human activities in society have been regulated by law whether traditionally governing the community or promulgated by a King or the community or given by

1. *Rakhmabai v. Govind*, (1904) 6 Bom. L.R. 421.

2. *Torabaz Khan v. Nanakchand*, A.I.R. 1932 Lah. 566.

3. *Singarayya v. Subbayya*, A.I.R. 1924 Mad. 861 : 47 M.L.J. 517.

4. *Gauri Shankar v. Mangal*, A.I.R. 1933 Lah. 178 (A.I.R. 1932 Lah. 566 followed).

5. *Chetoomal v. Shankerdas*, A.I.R. 1929 Sind 83.

6. Section 18 of the Industrial Disputes Act, 1947; *Tobacco Friends Union v. State of U. P.*, A.I.R. 1958 All. 688.

disciplined law-givers and accepted and enforced by the King or the community. Even as early as in the days of Hamurabi parties were not allowed in given cases to charge wages or rents higher than the scheduled rate. In India so late as in the days of the East-India Company different classes of borrowers had to pay different rates of interest. Status and statutes, including the sovereign power's orders and decrees, have thus imposed restrictions on the subject's or citizen's capacity or freedom to contract.

The welfare State of the Republic of India has maintained most of the British-Indian legislation as well as has promulgated many new Acts, Rules, Regulations, and Orders for the enhancement of the welfare of its citizens and in furtherance of the cause of world peace.

A reference in brief may herein be made to some of the laws that seek to impose obligations on some classes of the citizens that might otherwise be incidents of contractual agreements, where any made, between party and party. A policy of *laissez faire* followed on the part of the State might not in near future persuade the economically stronger class to concede to the terms and conditions of employment that have been ordained by the State of its own motion. A glance at the several volumes of the India Code will show how the State in its parental position has sought in given cases to afford relief, of its own motion, to the economically weaker class of its citizens in the matter of restriction of employment, prohibition or control of contracts in certain commodities, conditions of service, welfare of the working class, incapacitation of the working class for contracting out of the beneficial statutory provisions, hours of service, holidays, wages, provident fund, bonus, damages in respect of injuries sustained by workmen, sickness, maternity, insurance and other benefits, discharge and retrenchment, investigation, settlement and adjudication of industrial disputes, and other many miscellaneous matters.

To take some illustrations from the Central Acts. The Employment of Children Act, 1938,¹ regulates the employment of children in certain industrial employments. For the prohibition of employment of children in the particular occupations under the Act, *see* the Act. For the age of the child also *see* the Act. The Dock Workers (Regulation of Employment) Act, 1948,² provides for regulating the employment of dock workers. Employment of young persons on dangerous machines is prohibited under certain circumstances.³ Except under certain conditions, no woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work.⁴ No child who has not completed his fourteenth year shall be required or allowed to work in any factory.⁵ A child who

1. Act 26 of 1938.

2. Act 9 of 1948.

3. Section 23 of the Factories Act, 1948 (Act 63 of 1948).

4. Section 27, *ibid.*

5. Section 67, *ibid.*

has completed his fourteenth year or an adolescent shall not be required or allowed to work in a factory except under certain circumstances.¹ Under Section 109 of the Merchant Shipping Act, 1958,² except under certain circumstances, no person under fifteen years of age shall be engaged or carried to sea at work in any capacity in any ship.

The Imports and Exports (Control) Act, 1947,³ prohibits or controls imports and exports of specified commodities and as such contracts in respect of the said commodities made in contravention of the Act are void. The Essential Commodities Act, 1955,⁴ provides, in the interests of the general public, for the control of the production, supply and distribution of and trade and commerce in certain commodities. The Spirituous Preparations (Inter-State Trade and Commerce) Control Act, 1955,⁵ makes provisions for the imposition in the public interest of certain restrictions on inter-State trade and commerce in spirituous medicinal and other preparations, and provides for matters connected therewith.

The Industrial Employment (Standing Orders) Act, 1946,⁶ requires employers in industrial establishments formally to define conditions of employment under them. Conditions of service in a factory regarding the employment of young persons, male adults and women are regulated under the Factories Act, 1948.⁷ The Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955,⁸ regulates certain conditions of service of working journalists and other persons employed in newspaper establishments. Discharge of seamen or apprentices on change of ownership of a ship is provided for under Section 124 of the Merchant Shipping Act, 1958.⁹

The Mica Mines Labour Welfare Fund Act, 1946,¹⁰ constitutes a fund for the financing of activities to promote the welfare of labour employed in the mica mining industry. The Coal Mines Labour Welfare Fund Act, 1947,¹¹ makes better provision for financing measures for promoting the welfare of labour employed in the coal-mining industry. The Plantations Labour Act, 1951,¹² provides for the welfare of labour, and regulates the conditions of work in plantations. Under Section 119 of the Merchant Shipping Act, 1958, the Court is empowered to rescind contract between master, owner or agent and seaman or apprentice. In some of the Acts,

1. Section 68, *ibid.*
2. Act 44 of 1948.
3. Act 18 of 1947.
4. Act 10 of 1955.
5. Act 39 of 1955.
6. Act 20 of 1946.
7. Act 63 of 1948.
8. Act 45 of 1955.
9. Act 44 of 1958.
10. Act 22 of 1946.
11. Act 32 of 1947.
12. Act 19 of 1951.

provisions have been made for incapacitating labourers or workmen from contracting out of the beneficial provisions with which the employers have been burdened in favour of the working class. Any contract or agreement whereby a workman relinquishes any right or benefit has been declared, in certain cases, null and void. Specific illustrations will be found under Section 23, *post*.

Section 65 of the Motor Vehicles Act, 1939,¹ imposes restrictions of hours of work of drivers employed for the purpose of driving a transport vehicle. Working hours of adults are regulated by Sections 51 to 66 of the Factories Act, 1948.

The Weekly Holidays Act, 1942,² provides for the grant of weekly holidays to persons employed in ships, restaurants and theatres.

The Payment of Wages Act, 1936,³ regulates the payment of wages to certain classes of persons employed in industry. The Minimum Wages Act, 1948,⁴ provides for fixing minimum rates of wages in certain employments. Payment of wages of seamen and apprentices is governed by a number of Sections of the Merchant Shipping Act, 1958.⁵ Under Section 125 of the Act, wages are to be accounted for when a seaman is paid off or discharged. The Working Journalists (Fixation of Rates of Wages) Act, 1958,⁶ provides for the fixation of rates of wages in respect of working journalists and for matters connected therewith.⁷

The Employees' Provident Fund Act, 1952,⁸ provides for the institution of provident funds for employees in factories and other establishments. The Coal Mines Provident Fund and Bonus Schemes Act, 1948,⁹ makes provision for the framing of a Provident Fund Scheme and a Bonus Scheme for persons employed in coal mines.

The Employers' Liability Act, 1938,¹⁰ declares that certain defences shall not be raised in suits for damages in respect of injuries sustained by workmen. The Mines Maternity Benefit Act, 1941,¹¹ regulates the employment of women in mines for a certain period before and after child-birth and provides for payment of maternity benefit to them. Section 10 of the Act prohibits dismissal of women during or on account of absence from work owing to confinement. Section 12 penalises contravention of the Act by a woman. The Employees' State Insurance Act, 1948,¹² provides for

1. Act 4 of 1939.

2. Act 18 of 1942.

3. Act 4 of 1936.

4. Act 11 of 1948.

5. See Sections 125-148, *ibid*.

6. Act 29 of 1958.

7. See Section 7, *ibid*.

8. Act 19 of 1952.

9. Act 46 of 1948.

10. Act 24 of 1938.

11. Act 19 of 1941.

12. Act 34 of 1948.

certain benefits to employees in case of sickness, maternity and employment injury and makes provision for certain other matters in relation thereto.

Subject to the provisions of the Employees' State Insurance Act, 1948,¹ all employees in factories or establishments to which the Act applies shall be insured in the manner provided by the Act.²

The Industrial Disputes Act, 1947,³ provides for the retrenchment, and compensation to workmen in certain cases. The said Act also makes provision for the investigation and settlement of industrial disputes and for certain other purposes. The Industrial Disputes (Banking and Insurance Companies) Act, 1949,⁴ provides for the adjudication of industrial disputes concerning banking and insurance companies having branches or other establishments in more than one State.

As to implied contract between mortgagor and mortgagee, *see* Section 65 of the Transfer of Property Act, 1882.

The Merchant Shipping Act, 1958.—As to its commencement, *see* Notification No. S.O. 565 dated 26 February, 1960, Gaz. of India, Part II, Section 3 (ii), p. 886; and Notification No. S.O. 3127 dated 17 December, 1960, Gaz. of India Part II, Section 3 (ii), p. 3766. For transfer of ships or shares *see* Section 42; for registry of transfer *see* Section 43; as to mortgage of ship or shares, Section 47; as to entry of discharge of mortgage, Section 48; as to priority of mortgages, Section 49; as to rights of mortgagee, Sections 50 and 51; as to transfer of mortgages, Section 53; as to the liability of owners, Section 71; as to apprenticeship to the sea service *see* Sections 91-94; as to engagement of seamen, Sections 98-108; as to employment of young persons, Sections 109-113; as to engagement of seamen by masters of ships other than Indian ships, Sections 114-117; as to payment and rights of wages of seamen, Sections 125-148; as to power of courts to rescind contracts between master, owner or agent and seaman or apprentice *see* Section 149; as to disputes between seamen and employers, Sections 150 and 151; as to special provisions for the protection of seamen in respect of litigation *see* Sections 178-199.

Creation of trusts.—Section 5 of the Indian Trusts Act, 1882, lays down :

“No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

These rules do not apply where they would operate so as to effectuate a fraud.”

1. Act 34 of 1948.

2. Section 38, *ibid.*

3. Act 14 of 1947.

4. Act 54 of 1949.

Assignment of copyright.—No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.¹

Acknowledgement.—Section 19 of the Indian Limitation Act 1908, prescribed that acknowledgements in order to save limitation must be made in writing. Now Section 18 of the Limitation Act, 1963, does the same.

Arbitration agreement.—Under Section 2 (a) of the Arbitration Act, 1940, arbitration agreement means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. The Act does not require that it should be signed by the party or parties.²

An arbitration agreement is a contract within the meaning of Section 91 of the Indian Evidence Act, and when the parties to an agreement of reference refer to a dispute which arises between them, they cannot lead evidence to vary or add to the terms of the agreement by saying that they made the reference in any other capacity save that appearing from the agreement itself.³

Registration.—Apart from the Transfer of Property Act, 1882, registration of certain documents is compulsory under the Indian Registration Act, 1908.⁴ As to documents of which registration is compulsory Section 17 of the Act lays down :

“17. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

(a) Instruments of gift of immoveable property ;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property ;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest ; and

(d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent ;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property :

1. Section 19 of the Copyright Act, 1957.

2. *Umedsingh v. Seth Sobhagmal*, 53 Cal. 290 P.C.

3. *Radha Kishan v. Sapattar Singh*, A.I.R. 1957 All. 406.

4. *Padma Vithoba v. Md. Multani*, A.I.R. 1963 S.C. 70 : [1963] S.C.R. 229.

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in clauses (b) and (c) of sub-section (1), applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consists in whole or in part of immoveable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding; or

(vii) any grant of immoveable property by Government; or

(viii) any instrument of partition made by a Revenue Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(xa) any order made under the Charitable Endowments Act, 1890 (vi of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property and by public auction by a Civil or Revenue Officer;

Explanation.—A document purporting or operating to effect a contract for

the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

(3) Authorities to adopt a son, executed after the first day of January 1872, and not conferred by a will, shall also be registered."

Section 18 of the Indian Registration Act, covers documents of which registration is optional. It lays down :

"18. Any of the following documents may be registered under this Act, namely :—

(a) instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immoveable property;

(b) interests acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(c) leases of immoveable property for any term not exceeding one year, and leases exempted under Section 17;

(cc) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immoveable property;

(d) instruments (other than wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest to or in moveable property;

(e) wills; and

(f) all other documents not required by Section 17 to be registered."

Section 20 of the Act provides for the registration of documents containing interlineations, blanks, erasures or alterations. The Section lays down :

"20 (1) The registering officer may in his discretion refuse to accept for registration any document in which any interlineation, blank, erasure or alteration appears, unless the persons executing the document attest with their signatures or initials such interlineation, blank, erasure or alteration.

(2) If the registering officer registers any such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure or alteration."

Part X of the Indian Registration Act deals with the effects of registration and non-registration. Section 47 lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Section 48 of the Act lays down the rule as to when registered documents

relating to property take effect against oral agreements. Section 48 prescribes :

“48. All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force :

Provided that a mortgage by deposit of title-deeds as defined in Section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property.”

Section 49 of the Act prescribes the effect of non-registration of documents required to be registered. It lays down :

“49. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

- (a) affect any immoveable property comprised therein, or
 - (b) confer any power to adopt, or
 - (c) be received as evidence of any transaction affecting such property or conferring such power,
- unless it has been registered.

Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877,¹ or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.”

It has also been provided in Section 50 of the Act that certain registered documents relating to land will take effect against unregistered documents. The Section reads :

“50 (1) Every document of the kinds mentioned in clauses (a), (b), (c) and (d) of Section 17, sub-section (1), and clauses (a) and (b) of Section 18 shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

(2) Nothing in sub-section (1) applies to leases exempted under the proviso to sub-section (1) of Section 17 or to any document mentioned in sub-section (2) of the same Section, or to any registered document which had not priority under the law in force at the commencement of this Act.

Explanation.—In cases where Act No. XVI of 1864 or the Indian Registration Act, 1866, was in the place and at the time in and at which such unregistered document was executed, “unregistered” means not registered according to such

1. Now *see* Chap. II of the Specific Act, 1963.

Act, and, where the document is executed after the first day of July, 1871, not registered under the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act."

Exemption from registration.—The various State Bhoodan Yagna Acts have exempted gifts or grants of land, *danpatras* and declarations made in favour of Bhoodan Yagna from stamp duties, registration and attestation. As to exemption from compulsory registration of instruments relating to shares and debentures of societies registered under the Co-operative Societies Act, 1912,¹ see Section 27, *ibid*.

Cases of non-registration.—In *N. Varada Pillai v. Jeevarathnammal*, 46 I. A. 285 : A. I. R. 1919 P. C. 44, the transactions did not effect a valid gift of the property for such a gift had not been registered as required under Section 123 of the Transfer of Property Act. The said transactions might nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee. In *Padma Vithoba v. Mohd. Multani*, [1963] S. C. R. 229 : A. I. R. 1963 S. C. 70, the endorsement of cancellation on back of sale-deed was not registered. The said endorsement did not extinguish the title of the vendee and was not admissible in evidence except to show the character of the possession of the vendee.

Hire-purchase and credit-sale.—A mere contract of hiring without more, is a species of the contract of bailment, which does not create a title in the bailee. Ordinarily, a contract of hire-purchase confers no title on the hirer but a mere option to purchase on fulfilment of certain conditions. But a contract of hire purchase may also provide for the agreement to purchase the thing hired by deferred payments subject to the condition that title to the thing shall not pass until all the instalments have been paid. There may be other variations of a contract of hire-purchase depending upon the terms agreed between the parties. When rights in third parties have been created by acts of parties or by operation of law, the question may arise as to what exactly were the rights and obligations of the parties to the original contract. One of the tests to determine the question whether a particular agreement is a contract of mere hiring or whether it is a contract of purchase on a system of deferred payment of the purchase price is whether there is any binding obligation on the hirer to purchase the goods. Another useful test to determine such a controversy is whether there is a right reserved to the hirer to return the goods at any time during the subsistence of the contract. If there is such a right reserved, then clearly there is no contract of sale.²

Subject to statutory obligations, the incidents of a given hire-purchase agreement are the results of the terms thereof. On a non-compliance with the terms and conditions of the agreement the hirer may, in given circum-

1. See also the State Co-operative Societies Acts.

2. *D. V. Corporation v. State of Bihar*, A.I.R. 1961 S.C. 440; *Subbarayalu v. Annamalai*, A.I.R. 1944 Mad. 526; *Auto Supply Co. Ltd. v. Raghunatha*, (1929) 52 Mad. 829; A.I.R. 1929 Mad. 884.

stances, not only forfeit his right to purchase but may also be, in addition, liable to damages for breach of contract.¹

In India we have not yet any Act specially providing for hire-purchase agreements. The principles of the law of contract govern hire-purchase agreements in India. The Fifth Indian Law Commission has however taken up the subject of hire-purchase for the necessary codification of the law governing hire-purchase transactions. Pending the enactment of the proposed law governing hire-purchase agreements, it may be considered useful in this context to give an idea of the law of hire-purchase in England on the basis of English statutes and English Court decisions.

A hire-purchase agreement has been defined in England as an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee. A credit-sale agreement has been defined as an agreement for the sale of goods under which the purchase price is payable by five or more instalments. A hire-purchase agreement passes only the possession of the goods to the recipient with the option of subsequent purchase and is outside the scope of the English Sale of Goods Act, 1893. A credit-sale agreement transfers the property in the goods and is a sale within the meaning of the English Sale of Goods Act, 1893.² See *Bartlett v. Sidney Marcus, Ltd.*, [1965] 2 All E.R. 753.

The English Hire-Purchase Act applies in principle, though with variations in detail, to both hire-purchase agreements and credit-sale agreements, if the total price involved does not exceed (a) in the case of livestock £ 1,000, (b) in all other cases, £ 300.³

In England, unless the requirements of the Hire-Purchase Act are satisfied, the owner will not be entitled to enforce either the hire-purchase agreement itself or any contract of guarantee or other security which may have been given to support it, nor can he recover the goods from the hirer. The Court may however in special circumstances dispense with some of the requirements of the said Act. Credit-sale agreements also are subject to the same requirements under Section 3 of the said Act. As under the English Law of Property Act, 1925, failure to comply with the statutory requirements under the English Hire-Purchase Act, 1938, renders the contract not void but unenforceable. The sanction is only procedural and not a substantive one. The English Hire-Purchase Act, 1938, imposes significant restrictions upon the power to contract out of its provisions. By Section 8 of the Act, three sets of terms are implied in all contracts of hire-purchase to which the Act extends. First, there is an implied condition as to title, and implied warranties of quiet possession and freedom from incumbrances in favour of any third party at the time when the property is to pass.⁴ These terms apply notwithstanding

1. *Yeoman Credit Ltd. v. Waragowski*, [1961] 1 W.L.R. 1124 C.A.

2. *The English Hire-Purchase Act, 1938*, Section 21; *Warman v. Southern Counties Car Finance Corporation, Ltd.*, [1949] 2 K.B. 576; [1949] 1 All E.R. 711.

3. *The English Hire-Purchase Act, 1938*, Section 1, as amended by *Hire-Purchase Act, 1954*.

4. *Bowmakers (Commercial) Ltd. v. Day*, [1965] 2 All E. R. 856.

any agreement to the contrary. Secondly, there is an implied condition of merchantable quality. This condition operates in every case save where the goods are second-hand and are stated to be such in the memorandum required by Section 2 of the Act. Thirdly, where the hirer makes known the particular purpose for which the goods are required, there is an implied condition that the goods will be reasonably fit for that purpose. This third condition may be excluded or modified by the owner only if he proves that, before the agreement was made, the hirer was expressly notified of the exclusion or modification and clearly understood its effect.

In the ordinary hiring agreement of a specified chattel there is an implied condition that the chattel was fit for the purpose for which it was hired, except in the case where the defect was apparent to the hirer and he did not rely on the skill and judgment of the owner. The implied condition is part of the agreement between the parties. Even where the hirer had not repudiated but had approbated the agreement by paying instalments and kept the car, having possession and some use of it, and thus there has not been a total failure of consideration for his payments, the hirer is still entitled to repudiate the contract and is entitled to reasonable damages.¹

Where the (English) Hire-Purchase Acts, 1938, and 1954, prescribe some formalities, the question whether the written document was enforceable or was void depended on an examination of the true nature of the transaction; and for that purpose parol evidence was admissible in a case which involved the (English) Hire-Purchase Acts, since those Acts, like the English Bills of Sale Acts and the Rent Acts, could not be excluded by documents which, though purporting to be outside the Acts, represented a transaction which was in truth within their ambit. Where the parol evidence showed that the true bargain was one within the Acts and it did not comply with the statutory requirements it would be void and unenforceable against a party unless the said party was estoppel by his own negligence, say, in signing the form in blank, from asserting as against the other party that the written document was not his agreement. Holroyd Peace, L. J., however thought that it was doubtful whether an agreement which was unenforceable under the Hire-Purchase Acts could by estoppel be rendered valid and enforceable.²

An agreement of hire-purchase with option to purchase is a sale for the purpose of the Bengal Finance (Sales Tax) Act, 1941, as applied to Delhi.³

Where in a hire-purchase agreement the right to damages was not expressly excluded by the terms thereof, the owners were entitled to damages for the loss they had suffered, which was due to the hirer's breach of contract and not to the owners' retaking of the car and its resale at a loss. Thus there may be two separate causes of action, one for debt, being arrears due under the agreement, and one for damages for breach of contract.⁴ Whether in a given

1. *Yeoman Credit Ltd. v. Apps*, [1961] 3 W.L.R. 94 C.A.

2. *Campbell Discount Co. Ltd. v. Gall*, [1961] 2 W.L.R. 514 C.A.; *Wilson and Mooson v. Pickering*, [1946] 1 K.B. 422; 62 T.L.R. 223; [1946] 1 All E.R. 394 C.A. applied.

3. *Instalment Supply (P.) Ltd. v. Union of India*, A.I.R. 1962 S.C. 53.

4. *Overstone Ltd. v. Shipway*, [1962] 1 W.L.R. 117 C.A.

agreement there are distinct causes of action is an issue of construction.¹

The correct measure of damages as between a hirer under a hire-purchase agreement and dealers whose warranty had induced him to enter into the agreement is the whole damage suffered by the hirer, including his liability under the contract, and is not to be limited to the difference in value between the car as warranted and as in fact it was.²

A doing hire-purchase business undertook to a motor company to buy a car and undertook to C to hand it over on a hire-purchase agreement. C undertook to the company and also to A to acquire the car on hire-purchase if the company sold the car to A and the company undertook both to C and A to sell the car to A on condition that C acquired the car by hire-purchase. Servants of the company made misrepresentations to C and when C purchased the car it broke down owing to some latent defect. C was entitled to recover damages from the company.³

In the case of a hire-purchase agreement, if the hirer fails to perform his part of the contract, the owner of goods is entitled to damages. The proper basis for the assessment of such damages is the monthly rent agreed upon. Further, the owner is entitled to such rental up to the date of the delivery of the goods and a fair sum by way of damages for the use of the article where circumstances justify.⁴

In September, 1947, the hirer entered into a hire-purchase agreement with the S. C. Corporation in respect of a motor-car, undertaking to pay £155 as an initial payment and a sum of £9-18s. "rent" each month. After paying the requisite number of instalments the hirer was to have the option of purchasing the car for 1s. In January, February, and March, 1948, the hirer received letters from the L. F. Corporation or their solicitors claiming that the car was their property, and in April, on the day on which he made his final payment to the S. C. Corporation, he was served with a writ by the L. F. Corporation. He had ignored all communications from the L. F. Corporation and did not inform the S. C. Corporation of the claim made against him. The L. F. Corporation were, in fact, the true owners, the S. C. Corporation having received the car in good faith from another firm, who were themselves ignorant of any defect in their title. The hirer handed over the car to the L. F. Corporation, and now claimed damages from the S. C. Corporation. It was held that although at the time of making his final payment the hirer was aware that there was doubt whether the S. C. Corporation were the owners, he was entitled to rely on their warranty of the ownership because the warranty was given and became effective at the date of the agreement and not when the final payment was made. The S. C. Corporation, having failed to carry out the term which was the foundation of the agreement, namely, the sale of the car, were liable for breach of

1. *Yeoman Credit Ltd. v. McLean*, [1962] 1 W.L.R. 131 Q.B.D.

2. *Yeoman Credit Ltd. v. Odgers*, [1962] 1 W.L.R. 215 C.A.

3. *Dukharam v. Commercial Credit Corporation, Ltd.*, A.I.R. 1940 Oudh 35.

4. *Kasal Narayan v. Laxmi Narasimam*, (F.B.), A.I.R. 1955 Hyd. 104.

warranty and, the car not having been theirs to deal with, they were not entitled to any reduction of damages by way of set-off or counter-claim in respect of hiring charges for the period during which the hirer had had the use of the car. Though the defendants contended that, in assessing damages for breach of warranty, an allowance should be made for the reasonable charge of hiring the car during the seven months in which the plaintiff had used it, it was held that no such allowance could be made.¹

In March, 1955, the appellant bought in New Zealand a new American car from the respondents, who were dealers, for £1,207 which was the maximum controlled price. The importation of American cars into New Zealand was controlled by a licensing system administered by the New Zealand Board of Trade, licences being granted to importers subject to conditions, among which was a condition that the dealer would require the purchaser to enter into a deed of covenant that the purchaser would not within a period of two years from the date of the purchase of the car sell it unless he first offered it back to the dealer at the original prices less depreciation. Prices were controlled by orders made under the New Zealand Control of Prices Act, 1947, and by Section 2(1) of that Act "price" in relation to the sale of any goods included any valuable consideration which in effect related to the sale of any goods. Sale at a price not in conformity with the price control order was an offence. The appellant, on purchasing the new car, entered into the covenant with the respondents required by the Board of Trade. Three months later, in breach of the covenant, he sold the car for £1,700. The respondents sued him for breach of contract claiming £543 damage (*viz.* the difference between £1,700 and £1,157 which was the contractual resale price to the respondents, reached by deducting the depreciation, £50, from £1,207). The appellant contended (*a*), that the covenant was illegal as contravening the Act of 1947 in that, by taking the covenant, the respondents were taking a valuable consideration in addition to the maximum permitted price, and (*b*) that, if damages were recoverable, their amount should be £50, *viz.*, the difference between £1,207 and £1,157 as the respondents could only charge the maximum controlled price on reselling the car. It was held by their Lordships of the Privy Council that the covenant was given for the privilege of being allowed to buy the car, not as consideration for its purchase, and thus the covenant was not a valuable consideration which in effect related to the sale within the meaning of Section 2(1) of the Act of 1947; therefore the taking of the covenant did not contravene the Act of 1947 and the covenant was valid. Their Lordships further held that damages should be assessed on the basis that the respondents were entitled to go into the market, notwithstanding that it was a surreptitious market fed by breaches of covenant by those who sold their cars, and to buy a similar car at market price; the respondents, therefore, were entitled to £543 damages computed on the footing that the price of such a car in the surreptitious

1. *Warman v. Southern Counties Car Finance Corporation, Ltd. (W. J. Ameris Car Sales, Third Party)*, [1949] 1 All E.R. 711.

market was £1,700. The importers were entitled to assume that the right hand of the Government knew what the left hand was doing, and, therefore, to assume that the Director of Price Control knew that the dealers had to exact a special covenant, and fixed the maximum price on that basis.¹

A hire-purchase agreement in respect of a motor vehicle provided "2. The hirer agrees (a) to pay on the signing of this agreement the initial payment of £186 2 s. set out in the schedule hereto in consideration of the option to purchase contained in clause 3(b) hereof. Credit for such payment shall be given to the hirer only in the event of such option to purchase being exercised by him...3. The owners agree...(b) that if the hirer shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform all the terms and conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of 20 s." The hirer made the initial payment as required but before completing the monthly payments had execution levied against him by a judgment-creditor, and under a provision in the contract the agreement was terminated by the owners and the vehicle retaken by them. He brought an action for recovery of the initial payment on the ground of total failure of consideration in that he had never received the benefit of the option to purchase, because the owners had terminated the agreement. It was held by the Court of Appeal that the initial payment could not be recovered, for the option to purchase had existed from the date of the agreement and payment of the £186 2s. although its exercise was subject to the fulfilment of his obligations by the hirer.² In *Finances, Ltd. v. Baldock*, [1963] 1 All E.R. 443 C.A., there had been no repudiation of the hire-purchase agreement by the defendant and as such the plaintiffs were not entitled to damages for non-performance of the contract during the period for which it would have continued to run but for its determination by themselves.

F.O.B., F.O.R. and C.I.F. contracts.—Where contracts of sale involve the shipment of goods or carriage by rail certain obligations of the contract are generally indicated by the initials or words "f.o.b.", "c.i.f.", "c.f.i.", "ex ship", or "f.o.r." Such descriptions of the contract carry with them legal effects founded on the custom of merchants adopted into the law by the decisions of the Courts.

The initials "F.O.B." mean "free on board". Under an f.o.b. contract the seller puts the goods at his own expense for the account of the buyer. When on board, the goods are at the risk of the buyer who is considered to be the shipper. This is whether the goods are specific or unascertained. The expression in a contract reading: "Sold to Oriental Traders (India), Calcutta, 25 Printing machines f.o.b. Plymouth" means that, ordinarily, the seller has no other obligation than explained above. This immunity of the buyer is however subject to the rule that unless otherwise agreed, where

1. *Mouat v. Betts Motors, Ltd.*, [1958] 3 All E.R. 402 P.C.

2. *Kelly v. Lombard Banking, Ltd.*, [1958] 3 All E.R. 713 C.A.

goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit. This provision applies to f.o.b. contracts unless the buyer has sufficient information to enable him to insure or has waived notice.¹

Similarly, the initials "f.o.r." mean free on rail, and, ordinarily, nothing more.

Subject to above, the terms "f.o.r." (free on rail) and "f.o.b." (free on board) have no meaning in abstraction without reference to the terms of a particular contract. If the words "f.o.r." qualify the place of delivery in a particular contract then the seller's liability is to place the goods free on the rail as the place of delivery. If they qualify only the price then the consequences are not necessarily the same. Whether in a particular case on a particular contract the words "f.o.r." mean buyer's responsibility to procure railway wagons or whether it will mean that the availability of railway wagons is the basis of the contract the absence of which will lead either to frustration or discharge of seller's obligation will depend upon the facts of each case.² Loading into the railway wagons is not one of the indispensable conditions of f.o.r. contracts. Under f.o.r. contracts delivery may be made at the railway station also. In a particular case, whether the seller undertook to deliver the goods into railway wagons, or at the station at his own expenses, would depend, in the absence of any specific stipulation in the agreement itself, on the practice of the particular railway.³

All the technicalities and incidents of an f.o.b. contract cannot be imported into an f.o.r. contract. While normally there is an obligation under an f.o.b. contract for the buyer to name the ships there is no corresponding obligation apart from special agreement in an f.o.r. contract for the buyer to name the railway. Whatever may be the position in an f.o.b. contract where a port may be served by different ships and different lines, in an f.o.r. contract with only a monopoly railway serving a particular station there is no obligation on the part of the buyer apart from the express stipulation to that effect to procure railway wagons and to make them available to the seller.⁴ The term 'bilticut' means an f.o.r. contract, the price having to be paid against the delivery of the railway receipt.⁵

1. Section 32 of the English Sale of Goods Act, 1893; *Wimble v. Rosenberg*, [1913] 3 K.B. 743.

2. *Girija v. National Coal Co., Ltd.*, A.I.R. 1949 Cal 472; see *John Inglis v. William Stock*, (1885) 10 A.C. 263; 54 L.J.Q.B. 582; *H. O. Brandt & Co. v. H. N. Morris & Co.*, [1917] 2 K.B. 784; 87 L.J.K.B. 101; *Colley v. Overseas Exporters Ltd.*, [1921] 3 K.B. 302; 90 L.J.K.B. 1301.

3. *Union of India v. Vasudeo*, A.I.R. 1960 Patna 87.

4. As to different types of f.o.b. contracts, see *Iyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 2 W.L.R. 1005, 1018.

5. *Moolji Jaitha & Co. v. Seth Kirodimal*, A.I.R. 1961 Kerala 21; ⁵ *Seth Hajarimal v. Gulab chand*, A.I.R. 1956 Nag. 118.

The initials "c.i.f." or "c.f.i." stand for the words "cost, insurance, freight". The expression in a contract "Rs. 250 per tonne c.i.f. Kidderpore Docks, Calcutta" means that the sum includes the price of the goods, the premium for insuring them and the freight payable for carrying them to the named destination.

A c.i.f. contract usually provides for payment of "cash against documents".¹ The fact that the goods have not arrived at the time when the documents are tendered does not excuse the buyer from making immediate payment. The buyer however may reject the goods and recover the money paid by him if on arrival the goods are found not to be in conformity with the contract.²

The essential feature of an ordinary c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of document representing the goods and not by the actual physical delivery of goods by the seller. The principal obligations which the seller undertakes in a c.i.f. contract in the strict sense of the term are :

(a) to ship at the port of shipment within the time mentioned in the contract, goods of the description contained in the contract ;

(b) to procure on shipment a contract of affreightment under which the goods will be delivered, at the destination contemplated by the contract ;

(c) to effect an insurance on the goods upon the terms current in the trade which will be available for the benefit of the buyer ;

(d) to make out an invoice of the goods ; and

(e) to tender these documents to the buyer, namely, the bill of lading, the invoice and the policy of insurance.

But variations in one or other of these obligations or inclusion of terms in the contract inconsistent with these obligations do not prevent the contract from being a c.i.f. contract provided they do not affect the essential character of the contract. The only obligation on the buyer, apart from express agreement, is to be ready and willing to pay the price in exchange for the documents.³

In practice the buyer frequently agrees to accept documents other than those required under a strict c.i.f. contract. The buyer may agree, for example, to accept a certificate of insurance instead of a policy, or he may agree to accept a delivery order instead of a bill of lading. Such agreed deviations have however to be expressly provided for in the contract and it should be made clear whether or not the seller is to be entitled to sue for the price and the risk is to pass on tender of the substituted documents.

In an ordinary c.i.f. contract the seller has to tender the c.i.f. documents or the agreed documents to the buyer at the latter's residence or place of business, in the absence of any contract to tender the documents at any other place.

1. *Soorthingjee v. Nasurudeen*, (1917) 40 I.C. 526.

2. *E. Clemens Horst Co. v. Biddell Bros.*, [1912] A.C. 18.

3. *Narayanaswami v. Soundara Rajan & Co.*, A.I.R. 1958 Mad. 43 ; *Johnson v. Taylor Bros. & Co., Ltd.*, [1920] A.C. 144, 155, 156 ; 89 L.J.K.B. 227.

The use of the label c.i.f. is not conclusive. The true effect of all the terms of the contract must be taken into account though the description "c.i.f." must not be neglected.¹

The tender of the goods under a c.i.f. contract is effected by the tender of the bill of lading and accompanied in case the goods have been lost in transit by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. In the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided, of course, that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time.²

Under a c.i.f. contract the seller can give symbolical delivery of the goods by tendering to the buyer three documents, namely, a bill of lading, an invoice, and a policy of insurance. In law the tendering of these documents is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price.³

Delivery of the actual goods by the seller to the buyer is not required under a c.i.f. contract but delivery of the goods to a ship's Master is however undoubtedly required. It is also required that the goods must be of the contract description and that the relative bill of lading must not exceed or fall below the stipulated quantity. The obligation as to the delivery of the goods under c.i.f. contract is discharged by the delivery of the goods on board a ship instead of directly and at once to the buyer. As seen before, even after the shipping documents have been presented to the buyer and even after he has paid out the invoice price he still retains the right to examine the goods shipped to him and to reject them if he finds any deficiency in regard to either quantity or quality.⁴

Sales "ex ship".—In the case of a sale "ex ship" the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for delivery of goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest "upon goods", nor any interest which the seller is bound to insure for him. If the seller insure, he does so for his own purpose and of his own motion.

1. *Comptoir D' Achat et de Vente du Boerenbond Belge v. Luis de Ridder Limitada*, [1949] A.C. 293 ; [1949] 1 All E.R. 269 ; *Herman & Mohatta (India) Ltd. v. Pran Ballav*, A.I.R. 1960 Cal 524.

2. *Moolchand Kesarimull v. Associated Agencies*, A.I.R. 1942 Madras 139.

3. *Biddell Brothers v. Clemens Horst Co.*, [1911] 1 K.B. 214 ; *Phoenix Mills, Ltd. v. Dinshaw & Co.*, A.I.R. 1946 Bom. 469.

4. *Joseph v. Kedarnath*, A.I.R. 1959 Cal. 328 ; *E. Clemens Horst Co. v. Biddell Bros.*, [1912] A.C. 18.

The mere documents do not take the place of the goods under such a contract.¹

Building contracts.—Building contracts for their formation, characteristics and incidents are governed by the principles of the law of contract just as other contracts. A building or engineering contract is an agreement under which a person, namely, the builder or contractor, undertakes for reward to carry out for another person, namely, the building owner or employer, works of a building or civil engineering character. The work may have to be carried out upon the land of the employer or building owner. In special cases obligations to build may arise by contract where the land does not belong to the employer or building owner. In cases of building leases, and contracts for the sale of land with a house in the course of erection upon it, the land at the time of the building contract may not fully belong to the employer. As to the distinction between a contract for work and labour and contract for sale, see *Jariwala v. State of Gujarat* A.I.R. 1965 Guj. 253.

Contracts of employment of architects, engineers, or quantity surveyors by the building owner are sometimes associated with building and engineering contracts. Readers are referred to Alfred Hudson, *Building and Engineering Contracts*, 8th ed., 1959, and for further study on the subject to the under-mentioned texts.²

Section 2 (i) : Voidable Contract

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. A voidable contract is thus one which may be either affirmed or repudiated at the option of one of the parties but not of the other. Voidable means valid until repudiated.³ 'Void' means to deprive (something) of legal validity; to make legally void or invalid; to annul or cancel. 'Voidable' (from void (verb) *plus* able) means (something) capable of being annulled or made legally void; *spec.* (as distinguished from void), that may be either voided or confirmed.⁴ The option which characterises a voidable contract is an option either to say "it shall not be enforceable at all" or to leave it as a good contract enforceable by any party on the usual conditions. This is so in any case under Section 19; it is enforceable at the option of one party only in the sense that that party may elect to treat it as not binding upon any party. The voidable contract in a case of undue influence is

1. *Yangtze Insurance Association v. Lukmanjee*, [1918] A.C. 589.

2. *Salder Legal Aspects of Engineering*, New York, 1948; *Salder, Specifications and Law on Engineering*, New York, 1949; Thomson, *Architectural and Engineering Law*, New York, 1951; Werbin, *Legal Guide for Contracts, Architects and Engineers*, London, 1952; Phillips, *Building Law*, London, 1953; Crosswell, *Law relating to Building and Engineering Contracts*, London, 1954; Keating, *Law and Practice of Building Contracts including Architects and Surveyors*, London, 1955; and Salder, *Legal Aspects of Construction*, New York, 1959.

3. *Duncan v. Dixon*, (1890) 44 Ch. D. 211.

4. *Oxford English Dictionary*, 1933, reprinted 1961, vol. i, 586; vol. xii, 287, 288.

either going to be good or wholly void. After rescission it will not be enforceable at all.¹ As to voidability of contracts *see* Sections 19 and 19A, *post*.

As to consequences of rescission of a voidable contract, *see* under Sections 18 and 64, *post*.

Section 2 (j) : Contract when becomes void

A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by Section 2 (g), and one which became illegal in the course of performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by Section 2 (j). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void.² Thus where a vendee of land, who has not been given possession under the contract of sale and against whom an order under Section 145(6) of the Code of Criminal Procedure has been passed, fails to sue for possession of the land within 3 years as required by Article 47 of the Limitation Act, 1908³, the contract of sale does not become void within the meaning of Section 65 of the Contract Act so as to entitle him to recover the consideration of the sale-deed from the vendor.⁴ By the mere fact that the right to enforce specific performance of the contract has become barred, the contract does not become void as it has ceased to be enforceable. The provisions of Section 65 will not apply in the case in question.⁵

1. *Muralidhar v. International Film Co., Ltd.*, A.I.R. 1943 P.C. 34.

2. *Mahanth v. U. Ba Yi*, A.I.R. 1939 P.C. 110, 113 : (1939) Rang. L.R. 358 : 66 I.A. 198 : 181 I.C. 1 (P.C.) : 41 Bom. L.R. 742 ; Whitley Stokes : *Anglo-Indian Codes*, vol. I (1887), 547.

3. Now *see* Article 65 of the Limitation Act, 1963.

4. *Vishwanath v. Deokabai*, A.I.R. 1948 Nag. 382.

5. *Pulingundla v. Geddam*, A.I.R. 1945 Mad. 171. *Vishwanath v. Deokabai*, A.I.R. 1948 Nagpur. 382 ; *Harnath v. Indar Bahadur*, A.I.R. 1922 P.C. 403 ; *Mahanth v. U. Ba Yi*, A.I.R. 1939 P.C. 110 : 66 I.A. 198 : 181 I.C. 1 : (1939) Rang. L.R. 358.

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation or which has the effect of communicating it.

Communication, acceptance and revocation of proposals.

Communication of proposals.—The communication of proposals is deemed to be made by any act or omission of the party making the proposal by which act or omission he intends to communicate such proposal or which act or omission of his has the effect of communicating it. A proposal, that is, an offer can be made either to a particular person or to the public at large. The proposal made to the public at large will ripen into a contract with any member of the public who comes forward and accepts it.¹ In *Carlill v. Carbolic Smoke Ball Co.*, the defendants issued an advertisement in which they offered to pay £100 to any person who succumbed to influenza after having used one of their smoke balls in a specified manner and for a specified period. The defendants also deposited a sum of £1,000 with their bankers to show their sincerity. The plaintiff, on the faith of the advertisement, bought and used the balls as prescribed but caught influenza. She sued for the £100. In the instant case the proposal was construed as consisting of a definite promise to be bound provided that certain specified terms were accepted. It was a proposal, that is, a firm offer on the part of the defendants and not an invitation to treat. The proposal thus made by the defendants to the whole world through the medium of an advertisement was considered as duly communicated to the persons concerned.

As to when the communication of a proposal is complete see under Section 4, *post*.

Acceptance of proposals.—An offer remains capable of acceptance until the offeree is made aware of its withdrawal.² The acceptance of proposals is deemed to be made by any act of the party accepting the proposal by which act he intends to communicate such acceptance or which act or omission of his has the effect of communicating it. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. This assent on the part of the offeree may be gathered from his words of mouth, letters, documents, telephonic or teleprinter messages as

1. *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484, *affd.* [1893] 1 Q.B. 256.

2. *Henthorn v. Fraser*, [1892] 2 Ch. 27.

well as from his conduct. Acceptance of a proposal may be inferred from the conduct of the party accepting it. *Hindusthan Co-operative Insurance Society, Ltd. v. Shyam Sunder*¹ is a case in point. The facts were this. All papers, namely, the proposal, the medical reports and the friends' reports were completed and sent to the Insurance Company. The Company with the knowledge of the completion of the papers cashed the cheque sent to it by its organiser though the company knew that the organiser had no authority to receive the cheque as premium. It was the company which could take it or not as premium. It was held that the company by cashing the cheque and appropriating the money was deemed to have accepted the proposal. No communication was deemed necessary in the instant case to be made to the assured to complete the acceptance. The contract was deemed to have been made at the moment the money was appropriated. It was a completed contract. No subsequent communication by one of the parties could open the matter again. The company was therefore held liable to pay the insurance money. According to Section 8 of the Indian Contract Act, the performance of the conditions of a proposal or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is also an acceptance of the proposal. When two or more parties enter into a competition under the auspices of a third party each undertaking to be bound by the rules of the game they may be held to be entering into a contractual obligation with one another.² Under Section 7 of the Indian Contract Act, the assent on the part of the offeree must be an absolute one and not conditional. A conditional assent implies in law only a counter-proposal. In law, the earlier proposal is considered as removed by the counter-proposal as made by the original offeree.³ When once the original offeree has thus assumed the role of a proposer, making the counter-proposal, he cannot subsequently change his mind and unilaterally revive and accept the original proposal as made to him as offeree by the original proposer, because the original proposal has been removed in the eye of the law by his own counter-proposal. This counter-proposal has sometimes to be distinguished from a request for information on the part of the offeree which may be made by him while the proposal is still subsisting. Such an inquiry is construed in law as not destroying the original proposal. An acceptance on the part of the offeree communicated subsequent to this inquiry whether answered or not by the proposer will, therefore, result in a binding agreement.⁴ When the negotiations had been continued indefinitely resulting in proposals and counter-proposals and no concluded agreement could easily be ascertained, the conduct of the parties *inter se* may enable the Court to determine the

1. A.I.R. 1952 Cal. 691. *Life Insurance Corporation of India v. Tada Tirupathayya*, A.I.R. 1963 Andhra 353.

2. *Clarke v. Dunraven*, [1897] A.C. 59, 63.

3. *Hyde v. Wrench*, (1840) 3 Beav. 334.

4. *Stevenson v. McLean*, (1880) 5 Q.B.D. 346, 350.

point of time when a concluded agreement will be deemed in law to have been reached.¹

Apart from the cases of continued negotiations which often create a problem for the Court to determine the point of time at which a concluded agreement, if one at all, will be deemed in law to have been made by the parties, the expressions used in a written agreement may also sometimes create difficulties for a Court in deciphering whether a concluded contract has been effected thereby. Sometimes the parties may have reached an agreement though the execution of a more formal document may be awaited. It may also be the case where the parties have not yet reached a binding contract. The Court will have to decide in each fact-situation whether the parties did in fact reach a binding contract and were awaiting the execution of a formal deed of contract or they did not yet enter into a binding agreement but were only awaiting the formation of such an agreement.² Until such an agreement was or could be reached, the parties were as free as if they had not started any negotiations at all. Where the preparation or formal execution of a further document or the advice of a solicitor or other competent person is made a condition precedent to the formation of a binding agreement the case is one where the stage of a concluded contract had not been reached. A person cannot be bound by a one-sided offer which is never accepted, particularly when the parties intended that the contract should be reduced to writing. The insistence on a document excludes speculation as to what was and what was not agreed to however much the matter might have been raised by one of the parties during the stage of negotiation.³

Where the execution of a formal document is only desired for the sake of convenience, the stage of a concluded contract may be inferred as to have been reached.⁴ As in the case of determining the acceptance of an offer, the conduct of the parties as well as the facts of a given case may also help the Court in arriving at a conclusion as to whether a binding agreement had been reached between the parties *inter se*.⁵

Where the terms of an agreement are not capable of giving any idea as to the finality of the negotiations and where the conduct of the parties or the circumstances of the case as well as the trade practices concerned fail to indicate any concluded contract the Court will accept the view that no binding

1. *Brogden v. Metropolitan Ry. Co.*, (1877) 2 A.C. 666.

2. *Gujjar Mal v. Governor-General of India*, A.I.R. 1942 Pesh. 33; *Subimalchandra v. Radhanath*, A.I.R. 1934 Cal. 235; *Sreesgopal Mullick v. Ram Churn*, (1882) 8 Cal. 856; *Harichand v. Govind Luxman*, (1923) 47 Bom. 335 P.C.; A.I.R. 1923 P.C. 47; 71 I.C. 763; 50 I.A. 25; *Currimbhoy & Co. v. Creel & Sons*, A.I.R. 1933 P.C. 29.

3. *Thawardas Pherumal v. Union of India*, A.I.R. 1955 S.C. 468.

4. *Cohen v. Sutherland*, (1890) 17 Cal 919.

5. *Winn v. Bull*, (1877) 7 Ch. D. 29; *Chillingworth v. Esche*, [1924] 1 Ch. 97; *Eccles v. Bryant and Pollock*, [1948] Ch. 93; [1947] 2 All E.R. 865; *Branca v. Cobarro*, [1947] K.B. 854; [1947] 2 All E.R. 101; *Hillas & Co. v. Arcos, Ltd.*, [1932] 38 Com. Cases 23; *Foley v. Classique Coaches, Ltd.*, [1934] 2 K.B. 1.

agreement had at all been reached by the parties.¹ Where the language used is obscure and incapable of any definite meaning it is not possible for the Court to attribute to the parties any particular intention as to have been reached. For the impossibility in the circumstances of ascertaining any agreed intention as between the parties the purported agreement will be presumed in law as to have been left in an inchoate state not getting beyond the stage of negotiations. Where, again, the vagueness of the expressions used results in the purported agreement of being capable of embodying more than one intentions, the purported agreement will be deemed in law as to have no binding effect inasmuch as there has been no consensus *ad idem* as between the parties. Subject to this, a court of law inclines more in the direction of finding the formation of an enforceable agreement than in adjudging that there has been no concluded contract.²

In cases of life insurance there is a presumption that all communications before the issue of a policy are preliminary only; but if appropriate words are used, a binding contract may be made even before the issue of a policy.³ Whether the proposal of the assured had been accepted is a question of construction.⁴

Whether acceptance implies the knowledge on the part of the acceptor of the proposal made.—Suppose *R* offers, by way of reward, a necklace of a given weight and quality to anyone who will inform him of the whereabouts of *S* who is not traceable. Now, *J* may give *R* the necessary information though without knowing that the declaration of the reward had been made. Or, *N* may give the necessary information to *R* with the knowledge of the reward offered and with the intention of getting it. Or, *H* may give the necessary information to *R* with the knowledge of the reward offered but without the intention of getting the reward proposed, his motive being altogether altruistic or selfless. *V*, again may give the necessary information to *R* to gain his personal ends which are other than the gain of the reward, though the proposal of the reward was known to him. In the eye of the law only *N* will be presumed to have accepted the proposal.⁵ *N*, by giving the necessary information to *R* with the knowledge of the offer both accepts the offer and executes the consideration, thus entitling himself to the reward because acceptance in law implies the consciousness as to the proposal made. The fact of the knowledge of the proposal on the part of *N*, in the absence of anything to the contrary, will lead the Court to presume that *N* gave the necessary information to *R* with the intention of entitling himself to the reward, communication of the acceptance of the proposal having been waived by the proposer himself. *J*, while giving the necessary

1. *Scammell v. Ouston*, [1941] A.C. 251.

2. *Nicolene, Ltd. v. Simmonds*, [1953] 1 Q.B. 543 : [1953] 1 All E.R. 822.

3. *L. I. C. v. Thirupathayya*, A.I.R. 1963 Andhra 353 ; *Hindusthan Co-operative Insc Society, Ltd. v. Shyam Sunder*, A.I.R. 1952 Cal. 691.

4. *Ram Deo v. Lakshmi Insurance Co. Ltd.*, A.I.R. 1962 Punj. 125.

5. *Fitch v. Snedaker*, (1868) 38 N. Y. 248 (an American case) ; *R. v. Clarke*, [1927] 40 C.L.R. 227 ; *Bloom v. American Swiss Watch Co.*, South African Law R. (1915) App. D. 100.

information to *R* did it gratuitously because he had had no knowledge of the proposal earlier made. His giving the information was not tantamount in law to an acceptance; nor was it a case of executed consideration inasmuch as there was no proposal or offer held before him. Even where a proposal has been made to the whole world or to a particular section of the public, consent or assent thereto on the part of *J* could not be inferred in view of the fact that he for one had never heard of the proposal. Similarly, *H* or *V* did not give the information to *R* with a view to reaching a binding agreement with him. As neither of them meant business, the element of mutuality between the parties necessary to form a binding contract was absent in the case of *H* or *V*. In *Williams v. Carwardine*¹ it had however been held that motive was irrelevant, and that the giving of the information with the knowledge of the offer of the reward was sufficient to constitute in law an acceptance of the offer as well as an executed consideration. It will be noted that though motive may be considered irrelevant, the question of intention cannot be brushed aside in the matter of the formation of a binding contract. In the given cases neither *H* nor *V* meant any bargain. They did not mean any business. They had had no intention at all to enter into a contract, either expressly or impliedly, with *R*. The parties could not be said in law to be *ad idem* and consequently there could be no contract between *R* and *H* or *R* and *V*. Mere knowledge of the proposal would not go far. There being no unanimity of minds between *R* and *H* or between *R* and *V* no contract could result. Had there been, in the matter of giving the information to *R*, any intention, whether express or implied, on the part of *H* or *V*, to receive the reward proposed as the *quid pro quo*, the phenomenon of a binding agreement would be deemed in law to have been reached irrespective of the fact that the implied or express intention for the reward had been mixed up with feelings or motives of altruism or personal ends. In the case of *J* also, there was no unanimity of minds between *R* and *J*, the accompaniment of *R*'s proposal with *J*'s act being only fortuitous in its manifestation.²

As to when the communication of an acceptance is complete, see under Section 4, *post*. As to the revocation of proposals and acceptances, see under Section 5, *post*. As to how a revocation of a proposal is made see Section 6, *post*.

The need of communication of acceptance.—Mere mental assent to an offer does not conclude a contract. The acceptance must in ordinary cases be communicated, and if there is no such communication there is no concluded and binding agreement.³ As an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that consensus which is necessary

1. 5 C.P. 566. See also Sections 71 and 168, *post*,

2. *Tinn v. Hoffmann & Co.*, (1873) 29 L.T. 271; *Lalman Shukla v. Gauri Dutt*, (1913) 11 All L.J. 489; see also under Section 8, *post*.

3. *Felthouse v. Bindley*, (1862) 11 C.B.N.S. 869; *Powell v. Lee*, (1908) 99 L.T. 284.

according to the rules of English law, to make a contract. As notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. Where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance, without notification.¹ Subject to all this, the manner prescribed cannot be mere silence. Assent must be by express words or positive conduct. No duty is cast by the law upon the person to whom an offer is made to reply to that offer.²

Mode of communication of the acceptance of the proposal.—When a proposer has prescribed a particular mode of communicating the acceptance of the proposal made, the offeree has to communicate his acceptance in that very mode. Otherwise, ordinarily, the proposer may repudiate the acceptance.³ In England, this rule as to communication of acceptance has been applied in its spirit and not in its letters. English Courts have relied on the spirit of the prescribed mode of communication. Thus when the proposer prescribes a particular mode of communication of the acceptance of his proposal and the offeree communicates his acceptance in a different mode but equally or even more expeditious in its effect, the English Courts will not permit the proposer to repudiate the offeree's acceptance.⁴ When the offeree observes the prescribed mode of communicating the acceptance he thereby completes the phenomenon of agreement. Whether a particular mode of communicating the acceptance has been prescribed by the proposer has sometimes to be determined from a given fact-situation.⁵ In *Quenerduaine v. Cole*⁶ it was presumed that a proposal by telegram implied that its acceptance should be communicated in an equally expeditious way. An acceptance by post of a proposal made by telegram was thus held to be of no avail to the offeree. The offeror may however indicate the mode of communicating acceptance either expressly or by implication. Thus a person who addresses to another an offer by post is presumed to indicate, unless anything is said to the contrary, that the acceptance if any should or can be communicated by post.⁷ Where no particular mode of communicating the acceptance has

1. *Carlill v. Corbolic Smoke Ball Co.*, [1893] 1 Q.B. 256.

2. *Goddard Mall v. Tata Industrial Bank, Ltd.*, A.I.R. 1927 All. 407; *Subramania v. Ammapet Co-operative Society*, A.I.R. 1961 Mad. 289.

3. *Eliaison v. Henshaw*, (1819), 4 Wheaton, 225 (an American case).

4. *Tinn v. Hoffmann & Co.*, (1873), 29 L.T. 271.

5. *Kennedy v. Thomassen*, [1929] 1 Ch. 426.

6. (1883) 32 W.R. 185.

7. *Household Fire Insurance Co. v. Giant*, (1879) 4 Ex. D. 216; *Henthorn v. Fraser*, [1892] 2 Ch. 27.

been prescribed by the proposer, the nature of the proposal as well as the fact-situation in which it is made will be decisive as to the form or mode of communicating the acceptance thereof. Thus an oral proposal may be presumed to be accepted by word of mouth provided that such assent to the proposal is understood by the proposer. In the instant case the proposal will not ripen into a binding contract unless the proposer understands that his proposal has been accepted by the offeree.¹ This rule as to the necessity of the communication of the acceptance reaching the proposer holds good in cases of proposals being made by words of mouth, telephone, teleprinter and other modern means of communication. That is to say, in the instant cases of proposals there will be no binding contract until notice of the acceptance is received by the proposer. Where no mode of communicating the acceptance has been prescribed either expressly or impliedly by the proposer or where there is no accepted trade practice governing the mode of communication of the acceptance in the particular transaction concerned, acceptance by post is taken as the usual mode of communication.² Thus where a proposal is made and its acceptance is communicated through the post, a binding agreement is reached the very moment the letter accepting the proposal is posted, even though the letter may never reach the proposer.³

As to when the communication of an acceptance is complete under the Indian Contract Act, *see* under Section 4, *post*.

Acceptance of acceptance.—A binding agreement is reached when the proposal has been assented to by the offeree and the said assent on the part of the offeree has been communicated to the proposer. Under Section 4, *post*, the communication of an acceptance is complete as against the proposer when it is put in course of transmission to him so as to be out of the acceptor. An acceptance, on the part of the proposer, of the acceptance as made by the offeree is not a relevant factor in the formation of a binding agreement which is deemed to have been reached between the parties, *inter se*, as soon as the proposer's proposal has been accepted by the offeree and the said acceptance has been, in the eye of the law, communicated to the proposer either by a message or by the necessary conduct bringing to the knowledge of the proposer the fact of the necessary acceptance. Acceptance of acceptance though not relevant in English jurisprudence is indispensable in some of the continental countries of Europe.

The Fifth Indian Law Commission.—The heading of Chapter I of the Indian Contract Act, is inadequate. Chapter I includes also communication of acceptance (*see* Section 4) though the heading of the Chapter I does not so indicate. It appears that the heading should read: "Of the Communication, Acceptance and Revocation of Proposals and Communication and Revocation of Acceptances". Acceptance of Acceptance being exclu-

1. *Entores, Ltd. v. Miles Far East Corporation*, [1955] 2 All. E.R. 493, 495.

2. *Adams v. Lindsell*, 1 B. & Ald. 681; 106 E.R. 250.

3. *Byrne v. Van Tienhoven*, (1880) 5 C.P.D. 344, 348; *Henthorn v. Fraser*, [1892] 2 Ch. 27, 33; *Protap v. Kali Charan*, A.I.R. 1952 Cal. 32.

ded from the purview of the Act, a heading reading: "Of the Communication, Acceptance and Revocation of Proposals *and* Acceptances" would be misleading. The marginal notes to Section 3 are also inadequate. Revocation of acceptances, though included in the Section, has been omitted from the marginal notes. Section 3 being as it is the marginal notes thereto should read: "Communication, acceptance and revocation of proposals and revocation of acceptances". It may also be observed that the subject of communication of acceptances might as well be included in Section 3, instead of mentioning therein only the revocation of acceptances. If the communication of acceptances were also included in Section 3, the marginal notes thereto would, accordingly, read: "Communication, acceptance and revocation of proposals and communication and revocation of acceptances". It is not known how this aspect of Chapter I and Section 3 escaped its examination by the Fifth Indian Law Commission.

4. The communication of a proposal is complete, when it comes to the knowledge of the person to whom it is made.

Communication
when complete.

The communication of an acceptance is complete,—
as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) *A* proposes by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter,

(b) *B* accepts *A*'s proposal by a letter sent by post,

The communication of the acceptance is complete,—

as against *A* when the letter is posted:

as against *B*, when the letter is received by *A*.

(c) *A* revokes his proposal by telegram.

The revocation is complete as against *A*, when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram, *B*'s revocation is complete as against *B* when the telegram is despatched, and as against *A* when it reaches him.

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. *A* proposes by letter to sell a house to *B* at a certain price. The communication of the proposal is complete

when *B* receives the letter. There will be no proposal till it comes to the knowledge of the person to whom the proposal was intended to be made.¹

For further discussion on communication of proposals see under Section 3, *supra*. As to the point of the time till when a proposal may be revoked, see Section 5, *infra*.

As against the proposer, the communication of an acceptance is complete when it is put in a course of transmission to him, so as to be out of the power of the acceptor. *B* accepts *A*'s proposal by a letter sent by post. As against *A*, the communication of the acceptance is complete when the letter is posted.

As against the acceptor, the communication of an acceptance is complete when it comes to the knowledge of the proposer. *B* accepts *A*'s proposal by a letter sent by post. As against *B*, the communication of the acceptance is complete when the letter is received by *A*.

For further discussion on acceptance of proposals see under Section 3, *supra*. As to the mode of communication of the acceptance of proposal also see under Section 3, *supra*. As to the moment till when an acceptance may be revoked see Section 5, *infra*.

As against the person who revokes his proposal, the communication of his revocation of the proposal is complete when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person revoking his proposal. As against the offeree, that is, the person to whom the proposal was made and from whom the proposal is being revoked the communication of the revocation of the proposal is complete when it comes to his knowledge. *A* revokes by telegram his proposal made to *B*. The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when he receives it. Similarly, when *B* revokes by telegram his acceptance, the revocation is complete as against himself when the telegram is despatched. As against *A* it is complete when the telegram reaches him.

As to the moment when a contract may be said to be concluded, see *infra*.

Conclusion of contract.—Mere mental assent to a proposal does not conclude a contract. The acceptance must in ordinary cases be communicated, and if there is no such communication there is no concluded and binding agreement.² As an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so, the two minds may be apart, and there is not that consensus which is necessary according to the rules of English law to make a contract. For further discussion as to the need of communication of acceptance of proposal see under Section 3, *supra*.

An offer remains capable of acceptance until the offeree is made aware of

1. *Ratan Lal v. Harcharan*, A.I.R. 1947 All. 337; *Ahmad Bux v. Fazal Karim* (1940) Mad. 95; A.I.R. 1940 Mad. 49; 190 I.C. 154.

2. *Felthouse v. Bindley* (1862) 11 C.B.N.S. 869; *Powell v. Lee* (1908) 99 L.T. 284; *Entores, Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327.

its withdrawal. Where the parties must, from the context, have reasonably assumed that the post might be used as a means of communicating the acceptance of the offer, the acceptance is complete as soon as it is posted.¹

The ordinary rule of law, to which special considerations governing contracts by post are exceptions, being that the acceptance of an offer must be communicated to the offeror, the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.²

When the parties negotiate a contract orally in the presence of each other or over telephone and one of them makes an oral offer to the other, it is obvious that an oral acceptance is expected, and the acceptor must ensure that his acceptance is suitable, heard and understood by the offeror. The acceptance in such a case must be by such words which have the effect of communicating it. If the words of acceptance are inaudible and have not been heard or understood by the offeror, the acceptance is incomplete and no contract would be formed until the acceptor repeats his acceptance so that the offeror can hear it.

It is obvious from the language used in Section 4 about the completion of the communication of an acceptance that those provisions can have no applicability where the parties negotiate a contract in the presence of each other or over telephone. The object of Sections 4 to 6 is to fix the point of time at which either party negotiating the contract is precluded from changing his mind. Sections 4 to 6, therefore, are intended to fix the point of time at which either party is precluded from revoking the offer or acceptance. As a contract settled by telephone is complete only when the acceptance is received by the offeror, the place where the contract is made will clearly be the place where the acceptance is received.³

Special considerations governing contracts by post being exceptions to the general rule of law that the acceptance of a proposal must be factually communicated to the proposer, as soon as the acceptance is posted or sent by telegram, the acceptance is complete against the proposer, and so far as he is concerned the contract is concluded. The proposer is bound as soon as the acceptance is posted subject to the right of the acceptor to revoke his acceptance before the acceptance reaches the proposer.⁴ Because of the statutory provision as made in Section 4, even if the acceptance does not reach the proposer for the reason that it is lost or misplaced in transit, the contract would be complete, and for its breach the proposer would be entitled to sue in damages.⁵ A contract by correspondence is made at the place where the letter of acceptance is posted.⁶ Unless the offeror expressly

1. *Henthorn v. Fraser*, [1892] 2 Ch. 27.

2. *Entores, Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327.

3. *Kanhaiyalal v. Dineshchandra*, A.I.R. 1959 M.P. 234.

4. *Kamisetti v. Venkatasawmy*, (1904) 27 Mad. 355.

5. *Baroda Oil Cakes Traders v. Parshottam*, A.I.R. 1954 Bom. 491.

6. *Shimoga Oil Mills v. Radhakrishna Oil Mills*, A.I.R. 1952 Mys. 111; *Manilal v. Venkatachalapathy* (1944) Mad. 95.

or impliedly directs to the contrary an acceptance by letter is admissible. Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. In such circumstances, the effective date on which the option of acceptance is exercised by a party is to be ascertained from the date when the acceptance is put in transmission and the letter is posted.¹ Where a consideration is paid at a particular place the local Court will have the jurisdiction to try the suit brought on the contract in question.² In the case of commission agency business the cause of action arises at the place where the contract of agency business is made or at the place where the moneys due are to be paid.³

A contract by correspondance is made at the place where the letter of acceptance is posted.⁴ Where subsequent to the original contract the defendants offered by a letter to refund the advance paid by the plaintiff the plaintiff can be said to have accepted this last offer at his place when he applied for refund by his letter in reply. Such acceptance on the part of the plaintiff of the offer of refund as made by the defendants amounted to a new contract which will be deemed to have been made at the place of the plaintiff.⁵

Under Section 4, communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. An offer is made not at the place where, if it is made by letter, the letter is put into the post, but at the place where the letter is delivered. On this analogy it may be said that where there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract. The disclaimer or renunciation is not complete until it is communicated. The communication of the revocation of a contract is not complete until it reaches the other party. As the disclaimer or renunciation takes place at the place where the letter or telegram containing the disclaimer or renunciation is delivered, the Court at the place where such communication of renunciation of the contract is complete has got jurisdiction to try the suit for damages for breach of contract.⁶ The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of the cause of action. The offer is made at the place where it is received and if it is made by post or telegram the place of despatch is not a material factor. Similarly, the notice of rejection must be

1. *Protap v. Kali Charan*, A.I.R. 1952 Cal. 32; *Henthorn v. Fraser*, [1892] 2 Ch. 27.

2. *Sitaram v. Thompson* (1905) 32 Cal. 884.

3. *Devidatt v. Shriram* (1932) 56 Bom. 324.

4. *Manilal v. Venkatachalapathy* (1944) Mad. 95 (*Sepulchre Bros. v. Khushal Das* (1921) 2 M.L.J. 481 overruled).

5. *Shimoga Oil Mills v. Radhakrishna Oil Mills*, A.I.R. 1952 Mys. 111; *Mahomed Esuff v. Hateem & Co.*, A.I.R. 1934 Mad. 581; 153 I.C. 111; *Kamisetti v. Venkataswami*, 27 Mad. 355.

6. *Dhanraj Mills v. Narsingh*, A.I.R. 1949 Patna 270; *Arthur Butler & Co. v. District Board of Gaya*, 25 Patna 292; A.I.R. 1947 Patna 134.

taken to have been given in the place where the letter was received. The place of rejection is not material.¹ It is not every step taken in the completion of a contract that determines the jurisdiction of a Court to entertain a suit based on a contract. The mere making of an offer is not a part of the cause of action for a suit based on a contract and the suit cannot be brought at the place where the offer originated when the offer was accepted within the jurisdiction of another Court.² For a different view see *Engineering Supplies, Ltd., v. Dhandhaniah & Co.*, 58 Cal. 539 : 134 I.C. 65 : A.I.R. 1931 Cal. 659, 662, *Dhanmal v. Jankidas Baijnath*, 49 C.W.N. 123, and *Dobson & Barlow, Ltd., v. Bengal Spinning & Weaving Co.*, (1896) 21 Bom. 126, 134.

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval. Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied.³

In *Nalini v. Somasundaram*, A.I.R. 1964 Madras 52, the husband offered the wife certain terms for divorce. The wife obtained a decree for divorce based on those terms. Both the parties acted upon the terms. There was a concluded contract binding both.

As to the conclusion of contract in course of protracted negotiations, see *Construction of contract*, under Section 2 (h), *ante*, and *Acceptance of proposals*, under Section 3, *supra*.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation.—A proposal may be revoked by the proposer at any time before the communication of its acceptance is complete as against the proposer but not afterwards.⁴ As against the proposer the communication of an acceptance

1. *Ahmad Bux v. Fazal Karim*, (1940) Mad. 195 : A.I.R. 1940 Mad. 49 ; *National Insurance Co. v. Seethammal*, 65 M.L.J. 455 : 145 I.C. 998 : A.I.R. 1933 Mad. 764.

2. *Arthur Butler & Co. Ltd. v. District Board of Gaya*, 25 Patna 292 : A.I.R. 1947 Patna 134 ; *Manilal v. Venkatachalapathy* (1944) Mad. 95 (*Sepulchre Bros. v. Khushal Das* (1941) 2 M.L.J. 481 overruled).

3. *Adenna v. Jaggarayadu*, A.I.R. 1916 Mad. 75.

4. *Payne v. Cave*, (1789) 3 T.R. 148.

is complete when it is put in a course of transmission to him, so as to be out of the power of the acceptor. *A* proposes, by a letter sent by post, to sell his house to *B*. *B* accepts *A*'s proposal by a letter sent by post. *A* may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards. That is to say, *A*'s communication of revocation of his proposal must reach *B* before or at the moment the latter posts his letter of acceptance. As against *A*, the communication of the acceptance is complete when the letter of acceptance is posted.

Even where the proposal had been made as standing for a definite period, the proposer can at any moment withdraw it, provided it has not been in the meantime accepted by the offeree.¹ A proposal may be revoked at any time provided that it has not been accepted by the offeree or that such revocation has been communicated to him.² A bidder at an auction being treated as the proposer may thus withdraw his bid at any time before the hammer falls, even if there is a condition that no bidder shall retract his bidding.³ A letter to the offeree varying the terms of an offer made, the offeree's awareness of the withdrawal of the offer, or notice of acts on the part of the proposer inconsistent with the continuance of the proposal, are all taken as revocation of the proposal in question. A proposal made in writing may be revoked by word of mouth.⁴

Where a party offers to be bound by the statement of any of the opposite parties under Section 9 of the Oaths Act, 1873, he cannot resile from such an offer after the other party has agreed to make such oath, unless there be sufficient cause to the satisfaction of the Court for allowing the offeror to resile.

Where a party offers to be bound by the statement of a witness, he cannot resile from such offer if any of the opposite parties has accepted that offer or has made a similar counter-offer, unless there be sufficient cause to the satisfaction of the Court for allowing the offeror to resile; but he can resile from it if there has been no such acceptance or counter-offer by any other party to the judicial proceeding.⁵

Sections 8, 9 and 10 of the Oaths Act do not entitle a party to withdraw from the offer of being bound by special oath after once the said offer has been accepted by the other side. The Court, however, is not bound to administer the special oath and before the oath is taken, it is open to the Court to allow the party offering to be bound by such oath to resile from it for good and sufficient reasons.⁶ An offer to be bound by the special oath

1. *Routledge v. Grant*, (1828) 4 Bing. 653.

2. *Steuenson v. McLean*, (1880) 5 Q.B.D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27 C.A.

3. *Payne v. Cave*, (1789) 3 Term. Rep. 148.

4. See Halsbury : *Laws of England*, 3d edn., vol. 8 (1954), 71, 72.

5. *Saheb Ram v. Ram Newaz*, (F.B.), A.I.R. 1952 All. 882.

6. *Mahadeo v. Srjug*, A.I.R. 1952 Patna 208; *Ram Narain v. Babu*, 18 All. 46 : (1895) All. W.N. 158; *Siya Ram v. Jagannath*, 55 All. 298 : A.I.R. 1933 All. 463. For a contrary view see *Tumman v. Sheodardshan*, 52 All. 235 : A.I.R. 1930 All. 162; *Rup v. Arjun*, 153 I.C. 686 A.I.R. 1935 All. 276.

of a particular person once accepted by the person concerned being a party to the suit cannot be withdrawn except on very cogent grounds which, in the opinion of the Court, justifies it in exercising its discretion not to allow the special oath being administered. But it is not open to the party to make such an offer and then to withdraw it on frivolous grounds after it has been accepted by the other party. Such an offer may be withdrawn so long as it has not been accepted by the other party and acted upon.¹

As to the duration of proposal see under Section 2(a), *ante*. As to how a proposal may be revoked, see under Section 6, *infra*.

An acceptance of a proposal may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. As against the acceptor the communication of an acceptance is complete when it comes to the knowledge of the proposer. *A* proposes, by a letter sent by post, to sell his house to *B*. *B* accepts the proposal by a letter sent by post. The letter of acceptance is in the course of transmission to *A*. *B* may revoke his acceptance at any time before or at the moment when the letter communicating the acceptance reaches *A*, but not afterwards. That is to say, if *B* seeks to revoke his acceptance by telegram, and his telegram reaches *A* before his letter of acceptance, his revocation of acceptance will be effectual.

6. A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party ;

Revocation how
made.

(2) by the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Revocation of proposal by communication.—A proposal may be revoked by the communication of notice of revocation by the proposer to the other party. A revocation of proposal in order to be effective has to be communicated to the offeree. Thus, if the communication of the revocation of the proposal reaches the offeree later than his acceptance thereof the proposal stands as accepted and ripens into a binding agreement even though the communication of the revocation of the proposal had been posted earlier

1. *Baldeo Singh v. Niras Singh*, 222 I.C. 210 : A.I.R. 1946 Patna 272; *Khan Mahmud v. Syedali*, 35 C.W.N. 130 : A.I.R. 1931 Cal. 549; *Abaji v. Bala*, 22 Bom. 281; *Theyi Ammal v. Subbaraya*, 22 Mad. 234.

than the acceptance was completed as against the proposer.¹

A proposal may be revoked at any time provided that it has not been accepted by the offeree or that such revocation has been communicated to him.² A bidder at an auction being treated as the proposer may thus withdraw his bid at any time before the hammer falls, even if there is a condition that no bidder shall retract his bidding.³ Sections 4 to 6 seek to fix the point of time at which either party negotiating the contract is precluded from changing his mind. Under these Sections, a point of time is fixed at which either party is precluded from revoking the proposal or its acceptance.⁴ A person who makes the offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration.⁵ A proposal made in writing may be revoked by word of mouth. The notice of revocation may not always be express. It may also be a constructive one. A letter to the offeree varying the terms of the offer made is taken as revocation of the offer earlier made. The offeree's awareness of the withdrawal of the offer, or notice of acts on the part of the proposer inconsistent with the continuance of the offer is also taken as revocation of the proposal in question.⁶ The revocation of the proposal may not have to be thus in every case directly communicated to the offeree before its acceptance. It will suffice if it be brought to his knowledge by the conduct of the proposer before the offeree has completed his acceptance.⁷

Whether a promise in return for an act is revocable.—A proposal may be revoked at any time before its acceptance by the offeree. Thus, where an act has been done as the consideration for the promise held, the promise cannot be withdrawn, because a binding agreement has already been reached as between the promisor and the promisee. There may however be cases where the offeree or the promisee has just undertaken the commission of the act as the acceptance of the proposal as well as the execution of the consideration. The doctrine of acceptance if strictly applied requires that the acceptance must be complete and not merely partially shown.⁸ Suppose *P* promises to *S* to reward him with a Parker 51, gold cap, if the latter undertakes the journey from Calcutta to New Delhi to supply the former with a cook from Calcutta. Suppose also that when *S* has reached Mughal Sarai with the cook, another cook is found locally available for *P* and he wires *S* to stop his journey there at Mughal Sarai. Can *P* withdraw his offer of reward leaving *S* at Mughal Sarai, though no doubt it was open

1. *Byrne v. Van Tienhoven*, (1880) 5 C.P.D. 344; *Stevenson v. McLean*, (1880) 5 Q.B.D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27.

2. *Stevenson v. McLean*, (1880) 5 Q.B.D. 346; *Henthorn v. Fraser*, [1892] 2 Ch. 27 C.A.

3. *Payne v. Cave*, (1789) 3 Term. Rep. 148.

4. *Kanhaiyalal v. Dineshchandra*, A.I.R. 1959, M.P. 234.

5. *Somasundaram v. Government of Madras*, A.I.R. 1947 Mad. 366.

6. See Halsbury: *Laws of England*, 3rd edn., vol. 8 (1954), 71, 72.

7. *Dickinson v. Dodds* (1876) 2 Ch. D. 463; *Cartwright v. Hoogstool*, (1911) 105 L.T. 628.

8. *Offord v. Davies*, (1862) 1 C.B. (N.S.) 748.

to *S* not to undertake the journey at all or to cancel the engagement even having completed a part of the journey? Jurists have sometimes suggested that two separate proposals are embedded in the offer of such a reward.¹ The proposer expressly undertakes, it has been suggested, to reward *S* with a Parker 51, gold cap, on his completing the act allotted; he also impliedly undertakes not to revoke the proposal if *S* begins the performance of the act within a reasonable time. *S*'s undertaking the journey constituted not only the acceptance of the proposal but also partial execution of the consideration which would entitle him ultimately to the reward proposed. That is, *S* having undertaken the journey, *P* cannot revoke his proposal, though *S* would be entitled to the reward only when he executed the consideration, namely, brought the cook from Calcutta. But what if *P* withdrew the offer before *S*'s completion of the act? *P* would be liable in damages. The principle of *quantum meruit* will not be applicable in the given case.

Lapse of time.—A proposal is revoked by the lapse of time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of reasonable time, without communication of the acceptance. Even where the proposal had been made as standing for a definite period, the proposer can at any moment withdraw it, provided that it has not been meantime accepted by the offeree.² Where a memorandum is not a contract but simply a continuing offer, each successive order given by a party will be an acceptance of the offer as to the quantity ordered. The offer and each successive order will constitute a series of contracts. An order given after the offer is cancelled and withdrawn will not constitute a contract.³ In the case of a standing proposal the proposer is bound *pro tanto* by the acceptances, that is, demands made by the offeree. This is also subject to the rule that the withdrawal of the proposal must be brought to the knowledge of the offeree either directly or otherwise before any acceptance is complete from his side. To legally require the proposer to keep the proposal open for any given period the offeree has to enter into a binding agreement with the proposer on the basis of a fresh offer, a fresh acceptance and a fresh consideration, which three elements will result in another distinct contract though the parties have been the same. In the absence of any such fresh contract requiring the proposer to keep his original proposal open for a given period, he can withdraw his proposal at any time before its acceptance, and his original declaration to keep the proposal open for a given period being part and parcel of the original proposal itself, the withdrawal of the proposal, where permitted, means also the withdrawal of the declaration to keep the proposal open for a given period.

A proposal may be left open for a period as given on the part of the proposer. The period may be so given by express terms or implications. After the lapse of the time given for the acceptance of the proposal, the

1. See Cheshire and Fifoot : *The Law of Contract*, 6th ed., 1964, 49.

2. *Routledge v. Grant*, (1828) 4 Bing. 653.

3. *Bengal Coal Co. Ltd., v. Home Wadia & Co.*, (1900) 24 Bom. 97.

offer will be treated in law as withdrawn, any notice of revocation being considered unnecessary.

Where no time has been prescribed in a proposal by the proposer and no communication of its acceptance has been made within a reasonable time, the proposal will be considered in law as revoked. In the absence of any period given by the proposer for the acceptance of his offer, the duration of a given proposal will be gauged by the Court according to the nature and circumstances of the proposal in question. Thus, a change of time or circumstances may persuade the Court to conclude as if the proposal had been revoked in the eye of the law, though in fact it had not been so done. A lapse of time may in given circumstances enable the proposer to treat his proposal as withdrawn though he failed to take any positive steps in the matter of withdrawing his offer.¹ An allotment of shares must be made within a reasonable time. A person is not bound to accept an allotment made after the lapse of a reasonable time.²

If a proposer revokes his offer before its acceptance then Section 6(1) applies. Even if he does not revoke, Section 6(2) applies unless of course the proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time.

Applications for shares were made to a Company in March and July, 1933, and December, 1934. But allotment of shares was not made by the Company till August, 1935. No notice of allotment was given to proposers till then and there was nothing in the applicant's conduct which amounted to waiver of the revocation. In the circumstances, Section 6(2) of the Contract Act was held as applicable and the proposals were deemed to have been revoked.³

Non-fulfilment of condition precedent.—If the proposer has attached a condition as condition precedent to the acceptance of his proposal and the acceptor fails to fulfil that condition prior to his acceptance of the proposal, the proposal will be deemed in law as revoked as against that acceptor.

Where an offer is made subject to a condition and that offer is accepted, the person accepting the offer is presumed in law to have accepted it with the condition so attached, and he cannot be heard to say that though he accepted the offer, he was not bound by the condition.⁴ A conditional offer to pay a certain amount made by the management of an industry to the trade union lapses when the condition is not accepted.⁵

Death or insanity of the proposer.—The death or insanity of the proposer if known to the offeree before he accepts the proposal determines the proposal.⁶

1. *Ramsgate Victoria Hotel Co. v. Montefiore* (1866), L.R. 1 Ex. 109; *Loring v. City of Boston* (1844), 7 Metcalf 409.

2. *Indian Co-operative Navigation & Trading Co., Ltd. v. Padamsey Premji*, A.I.R. 1934 Bom. 97.

3. *Ramlalsao v. Malak*, A.I.R. 1939 Nag. 225.

4. *State of Bihar v. Charanjilal*, A.I.R. 1960 Patna 139.

5. *Pipraich Sugar Mills v. Mazdoor Union*, A.I.R. 1957 S.C. 95.

6. *Dickinson v. Dodds* (1876), 2 Ch. D. 463, 475, C.A.

Bankruptcy of the proposer.—In the case of a proposal relating to his property, bankruptcy of the proposer will determine the proposal.¹

Qualified acceptance.—If the offeree rejects the proposal or accepts it in a qualified manner, the proposal will be deemed to be terminated so far as the said offeree is concerned. *See below.*

7. In order to convert a proposal into a promise, the acceptance must—

Acceptance must be absolute.

(1) be absolute and unqualified ;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but if he fails to do so, he accepts the acceptance.

Absolute and unqualified acceptance.—In order to convert a proposal into a promise, that is, an accepted proposal and as such enforceable, the acceptance thereof must be absolute and unqualified.² The acceptance must be expressed in some usual and reasonable manner unless a particular manner has been prescribed therefore. Where the acceptance has been made in a manner different from the one prescribed in the proposal, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner alone, and not otherwise. If however the proposer fails to so insist, he will be considered in law as to have accepted the acceptance though not expressed in the manner prescribed by him. This is so also in the case of a composite offer.³

If the offeree accepts the proposal in a qualified manner the proposal will be deemed to be terminated so far as the said offeree is concerned. No binding agreement can consequentially arise because of the qualified acceptance.⁴

Where an offer is made subject to a condition and that offer is accepted, the person accepting the offer must be presumed to have accepted it with the condition so attached, and he cannot be heard to say that though he accepted the offer, he was not bound by the condition.⁵

When an indent form forms part of the offer which a party accepts, and

1. *Meynell v. Surtees*, (1855) 1 Jur. N.S. 737.

2. *Moolji Jaitha & Co. v. Seth Kirodimal*, A.I.R. 1961 Ker. 21; *Jawahar Lal v. Union of India*, A.I.R. 1962 S.C. 378; *Union of India v. Gangadhar Mimraj*, A.I.R. 1962 Patna 372.

3. *General Assurance Society Ltd. v. L. I. C. of India*, A.I.R. 1964 S.C. 892.

4. *Moolji Jaitha & Co. v. Seth Kirodimal*, A.I.R. 1961 Ker. 21.

5. *State of Bihar v. Charanjilal*, A.I.R. 1960 Patna, 139; *Union of India v. Gangadhar Mimraj*, A.I.R. 1962 Patna 372; *Raghuandan v. State of Hyderabad*, A.I.R. 1963 Andhra 110.

the said indent form contains an arbitration clause the party accepting the offer is bound to abide by the arbitration clause.¹

The assured had given a warranty which, in case of insurance, operated as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration was substantially and in fact true. The question for the Court to consider, therefore, was, not the materiality or otherwise of that statement, but its truth.² A passenger has been held bound by the clauses and conditions printed on the back of the passage-ticket.³ The plaintiff was held as bound by the conditions given at the back of the forwarding note signed by him.⁴ For further discussion on this see *ante*.

A conditional offer to pay a certain amount made by the management of an industry to the trade union lapses when the condition is not accepted. The question whether there was consideration for the promise made by the management arises only if the offer made had been accepted by the trade union so as to ripen into a binding agreement.⁵

The assent to the proposal on the part of the offeree must be an absolute one and not conditional. A conditional or qualified acceptance implies in law a counter-proposal. In law, the earlier proposal is considered as removed by the counter-proposal as made by the original offeree.⁶ When once the original offeree has thus assumed the role of a proposer, making the counter-proposal, he cannot subsequently change his mind and unilaterally revive and accept the original proposal as made to him as offeree by the original proposer, because the original proposal has been removed in the eye of the law by his own counter-proposal. This counter-proposal has sometimes to be distinguished from a request for information on the part of the offeree which may be made by him while the proposal is still subsisting.⁷ Such an inquiry is construed in law as not destroying the original proposal. Whether the inquiry is answered or not by the proposer, it is open to the offeree to accept the proposal, and his acceptance, even though made subsequent to the inquiry made, will result in a binding agreement.⁸ A counter-offer puts an end to the original offer. It implies rejection of the offer.⁹ Where, however, the original proposer accepts the counter-proposal a new contract will emerge.¹⁰

1. *Radha Kanta v. Baerlein Bros. Ltd.*, A.I.R. 1929 Cal. 97.

2. *Oriental Govt. Security Life Assurance Company, Ltd. v. Narasimha Chari* (1902) 25 Mad. 183.

3. *MacKillican v. Compagnie Des Messageries Maritimes De France*, (1881) 6 Cal. 227.

4. *Madras Railway Co. v. Govinda Rau*, (1898) 21 Mad. 172.

5. *Pipraich Sugar Mills v. Mazdoor Union*, A.I.R. 1957 S.C. 95.

6. *Hyde v. Wrench* (1840), 3 Beav. 334.

7. *Moolji Jaitha & Co. v. Seth Kerodimal*, A.I.R. 1961 Ker. 21.

8. *Stevenson v. McLean* (1880) 5 Q.B.D. 346, 350.

9. *Nihal Chand v. Amar Nath* A.I.R. 1926 Lah. 645.

10. *Kundan Lal v. Secretary of State* (1939) 14 Luck. 710.

Where the acceptance is conditional, no contract is completed.¹ A so-called absolute acceptance of an offer will not make a binding contract if, in fact, it does not extend to all the terms of the contract under negotiations or if it is only a provisional arrangement subject to the condition that a further agreement would be executed.² Once however the original offer has been unconditionally accepted, the fact that a new and collateral term is annexed to the said absolute acceptance will not affect the formation of the contract as originally proposed. The entire negotiations as well as the correspondence on which the contract depends have to be considered.³ An acceptance by an insurance company of a proposal for life insurance on condition that the first premium thereunder should be paid within thirty days from the date of that acceptance is in law a counter-offer to be completed thereafter into contract by the fulfilment of that condition as required thereunder.⁴ An absolute acceptance is where the sale officer, or the auctioneer, as the case may be, is given full authority to accept a bid unconditionally. A provisional acceptance means that the sale officer or the auctioneer had only a right to receive the bids and pass them on to his superior who is the final authority to confirm and conclude the contract. In that case, the auctioneer acts merely as a conduit pipe to convey the highest bid to the superior. Conditional acceptance has the effect of binding the highest bidder to the contract if finally there is the approval or confirmation by the superior indicated in terms of sale.⁵ A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfilment of the condition on which a provisional acceptance is based. At an auction-sale of liquor-shop licences held in accordance with the conditions of sale prescribed by the Board of Revenue the plaintiff's bid was provisionally accepted by the selling officer. The final acceptance rested with the Collector under the conditions of sale. The conditions stipulated that no bid which had been provisionally accepted should be withdrawn before it lapsed on a higher bid being accepted or before orders were passed confirming or refusing to confirm it. As the said conditions of sale were not settled by the Board of Revenue under any particular provision of the Madras Abkari Act, 1886, and their publication did not amount to a notification under Section 69 of that Act, it was held, they had no statutory force. The plaintiff was, therefore, entitled to withdraw the bid because the prohibition against withdrawal had not the force of law and there was no consideration to bind him down

1. *Henry Earnest Meaney v. Eyre Walker*, A.I.R. 1947 All. 332; *Union of India v. Narain Singh*, A.I.R. 1953 Punj. 274.

2. *Namayya v. Union of India*, A.I.R. 1958 Andhra 533; *Hussey v. Horen Payne* (1879), 4 A.C. 311; *Winn v. Bull* (1877), 7 Ch. D. 29.

3. *Namayya v. Union of India*, A.I.R. 1958 Andhra 533; *Mahomed Yusuf v. Secretary of State* (1921) 45 Bom. 8; A.I.R. 1921 Bom. 200; *Jainarain v. Surajmull*, A.I.R. 1949 F.C. 211.

4. *Benarasi v. New India Assurance Co.*, A.I.R. 1959 Patna 540.

5. *Rajanagaram Village Co-operative Society v. Veerasami* A.I.R. 1951 Mad. 322; *Adenna v. Jaggarayadu*, 28 M.L.J. 617; A.I.R. 1916 Mad. 75; *Somasundaram v. Government of Madras* (1947) 1 M.L.J. 123; A.I.R. 1947 Mad. 366.

to the condition.¹ A tender whether oral or written, and, therefore, also a bid may be made irrevocable by virtue of any rule made under the provisions of an Act.² An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words or conduct; and a bidding at an auction is a mere offer which may be retracted before the hammer is down. Such is the rule with regard to auctions in general, and the same must be held to be applicable also to Court auctions, in the absence of any law or rule to the contrary.³

Manner of acceptance.—The law requires that an acceptance of a proposal in order to effect a binding agreement must not only be absolute, unconditional, and unqualified but such acceptance must also be expressed in some usual and reasonable manner unless a particular manner has been prescribed by the proposer. Where the proposer has prescribed a particular manner for the acceptance of his proposal but the acceptor has accepted the proposal in a manner different from the one prescribed, the proposer may within a reasonable time after the acceptance has been communicated to him, insist that his proposal should be accepted in the prescribed manner alone, and not otherwise. If however he fails to so insist, he will be considered in law as to have accepted the acceptance and acquiesced in the manner of acceptance as followed by the acceptor, and a binding agreement will arise.

Unless the offeree accepts the proposal in the prescribed manner, where any, the proposer may, ordinarily, repudiate the acceptance.⁴ This rule as to the manner of acceptance is sometimes applied in its spirit and not in its letters. Thus where the offeree accepts the proposal in a manner different from the one prescribed but equally or even more expeditious in its effect the Courts have not permitted the proposer to repudiate the offeree's acceptance.⁵ Where a letter by an intending seller making an offer for the sale of certain property directs that the purchaser will have to write about the acceptance of the offer to a certain person at a particular address, the letter is to be read in a reasonable and sensible manner and it does not exclude the case where the intending purchaser instead of writing to the person concerned puts himself into communication with him and where the intending purchaser does so, it cannot be said that there is any contravention of Section 7 of the Contract Act, as to render the contract not binding on the intending seller.⁶

The proposer may indicate the manner of accepting his proposal either

1. *Somasundaram v. Government of Madras*, A.I.R. 1947 Mad. 366 : (1947) 1 M.L.J. 123 ; *Cooke v. Oxley* (1790), 3 T.R. 653 : 100 E.R. 785 ; *Payne v. Cave* (1789), 3 T.R. 148 : 100 E.R. 502.

2. *Secretary of State v. Bhaskar Krishnaji*, (1925) 49 Bom. 759 : A.I.R. 1925 Bom. 485.

3. *Agra Bank v. Hamlin* (1891), 14 Mad. 235 ; *Mackenzie Lyall & Co. v. Chamroo Singh & Co.* (1889), 16 Cal. 702.

4. *Elison v. Henshaw*, 4 Wheaton, 225 (an American case).

5. *Tinn v. Hoffmann & Co.* (1873), 29 L.T. 271.

6. *Surendra v. Kedar*, A.I.R. 1936 Cal. 87.

expressly or by implication. Whether a particular manner of acceptance has been prescribed by the proposer in a given fact-situation is sometimes an issue of construction.¹ It is presumed that a proposal by telegram implies that its acceptance should be communicated in an equally expeditious way. An acceptance by post of a proposal by telegram will be of no avail to the offeree.²

As to the mode of communication of the acceptance of proposal *see* under Section 3, *ante*. *See also The need of communication of acceptance*, under Section 3, *ante*.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by performing conditions, or receiving consideration.

Acceptance by performance of conditions.—Performance of the conditions of a proposal is an acceptance of the proposal. In order to enable a proposal to ripen into a binding contract its acceptance on the part of the offeree must be manifest either through some word or act on his part which word or act must be considered adequate enough to be treated in law as the communication of his acceptance to the proposer. No response to a proposal made is not construed in any case as an acceptance.³ Silence to a proposal does not amount in law to consent or acceptance. Notification of acceptance is essential in order to enable a proposal to ripen into a contract. The communication of acceptance though deemed essential may however be waived by the proposer. This waiver of communication of acceptance of a proposal may be express or implied. If the person making the proposal expressly or impliedly intimates in his offer, that it will be sufficient to act on the proposal without communicating its acceptance to the proposer, performance of the condition is a sufficient acceptance of the proposal made though there be no communication on the part of the offeree of the acceptance concerned to the proposer.⁴ If a child is lost, and the parents declare a reward to any person who brings the child to them at a particular place, the bringing of the child to the parents with the knowledge of the offer of the reward will be deemed to be an acceptance on the part of the person bringing it though such a person did not notify his acceptance of the proposal of reward to the parents concerned.

A young boy ran away from his father's home. The father eventually issued a pamphlet, offering a reward in these terms: "Anybody who finds trace of the boy and brings him home, will get Rs. 500/-." The plaintiff was at the *dharamshala* of a railway station, there he saw a boy, overheard part

1. *Kennedy v. Thomasson*, [1929] 1 Ch. 426.

2. *Quenerduaine v. Cole*, (1883) 32 W.R. 185.

3. *Felthouse v. Bindley*, (1862) 11 C.B.N.S. 869 ; 31 L.J. C.P. 204 ; *Bholat v. Yokohama Species Bank, Ltd.*, A.I.R. 1941 Rang. 270.

4. *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484, affirmed, [1893] 1 Q.B. 256.

of a conversation, realised that the boy was the missing boy and promptly took him to the railway police station where he made a report and sent a telegram to the boy's father saying that he had found his son. It was held that the hand-bill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition and that the plaintiff substantially performed the condition and was entitled to the amount offered.¹

Where a conditional promise has been made by a party and the promise accepted and the condition performed by the other, a complete contract will result in the circumstances as between the parties.²

Where a surety definitely asks a creditor by letter to advance money to a debtor up to certain amount and holds himself responsible for that amount, and where the letter does not contemplate any communication of acceptance the advancement of money amounts to acceptance of the proposal and the contract of guarantee is complete.³

Where the acceptance of bid in an auction sale is a conditional acceptance, and it is communicated to the bidder, there is no need for a further communication of the fulfilment of the condition. The communication of the acceptance twice, that is, once when the conditional acceptance is made and again when the condition is fulfilled is not necessary.⁴

There is in principle a material distinction between the acceptance of an offer which asks for a promise and an offer which asks for an act on the condition of the offer becoming a promise. In the former case where the acceptance is to consist of a promise there must be communication to the proposer. In the latter class of cases where acceptance is to consist of an act, despatching goods ordered by post, for example, the rule is that no further communication of the acceptance is necessary than the performance of the proposed act⁵

Knowledge of the proposal.—The performance of the conditions of a proposal in order to be tantamount to an acceptance of the proposal in question has to be effected by one who was aware of the proposal made. While under Section 3, *ante*, it has been seen that the mere performance by a person of the conditions of a proposal even when made to the whole world does not necessarily mean consent or assent to the proposal if there has been no *consensus ad idem* between the proposer and the person performing the conditions of the proposal. The person performing the conditions of the proposal must do so with the knowledge of the proposal as well as with the intention to create a legal relation between him and the proposer. In the absence of either of these two last-mentioned elements a contractual

1. *Har Bhajan v. Har Charan*, A.I.R. 1925 All. 539.

2. *Venkayamma v. Appa*, (1916) 39 Mad. 509 P.C.

3. *Ranga Ram v. Raghbir*, A.I.R. 1928 Lah. 938.

4. *Rajanagaram Village Co-operative Society v. Veerasami*, A.I.R. 1951 Mad. 322; *Adenna v. Jaggarayudu*, 28. M.L.J. 617 : A.I.R. 1916 Mad. 75.

5. *State of Bihar v. Bengal Chemical and Pharmaceutical Works, Ltd.*, A.I.R. 1954 Patna 14.

obligation will not emerge between the proposer and the person performing the conditions of the proposal. In the absence of a unanimity of mind between the proposer and the person performing the conditions of the proposal, the accompaniment of the proposal with the person's performance is, in the eye of law, only fortuitous in its manifestation. In *Lalman Shukla v. Gauri Dutt*,¹ the plaintiff volunteered his services in the search of an absconding boy. While the plaintiff was away in his mission of search, the defendant, uncle of the absconding boy, issued hand-bills offering a reward to anyone who might find out the boy. The plaintiff traced out the boy but without the knowledge of the declaration of the reward. In the circumstances, the plaintiff was held not entitled to the reward. To repeat, contractual obligations do not arise if services are rendered which in fact fulfil the terms of an offer but are performed in ignorance that the offer exists. There cannot be assent without knowledge of the offer and reliance upon it.²

Cross-offers.—Cross-offers as such do not constitute an exchange of promises and therefore do not bring forth an agreement. The promise of offer, in case of cross-offers, being made on each side in ignorance of the promise or offer made on the other side, neither of them can be construed as an acceptance of the other.³

Receiving consideration.—The acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal. Where a party accepts a payment in satisfaction of his claim without any objection, it should be deemed that he has accepted it on the condition on which it was offered, and it is not open to him to say subsequently that he accepted the payment in part satisfaction of his claim.⁴ A promise entails a legal obligation on one side to perform the promise and on the other to accept performance of it. No promise can be inferred unless it is open to the beneficiary either to accept or to reject the benefit of the work.⁵ Where there is no option there is no right to sue on a *quantum meruit*.⁶ The acquiescence of the appellants for nine years in the mode of charging interest entitled the respondents to set up an implied agreement on the appellant's part to pay it in that way.⁷

The mere sending of a notice by a bank to one of its customers that the interest charged on overdrafts against surety held by the bank had been raised is not of itself sufficient to render the customer liable to pay the enhanced rate. But where, after receiving notice that the rate of interest has

1. (1913) 11 All. L.J. 489. See also *Tinn v. Hoffmann & Co.* (1873), 29 L.T. 271, 279.

2. *Crown v. Clarke (R. v. Clarke)*, [1927] 40 Commonwealth Law Reports, 227 (High Court of Australia).

3. *Tinn v. Hoffman & Co.* (1873), 29 L.T. 271, 279.

4. *Behari Lal v. Radhye Shyam*, A.I.R. 1953 All. 745; *Gaddar Mal v. Tata Industrial Bank, Ltd.*, 49 All. 674; A.I.R. 1927 All. 407—followed.

5. *Munro v. Butt* (1858), 8 E. & B. 738.

6. *Sumpter v. Hedges*, [1898] 1 Q.B. 673.

7. *Haridas Ranchordas v. Mercantile Bank of India*, (1920) 44 Bom. 474 P.C.

been raised, the customer borrows more money from the bank, the bank is justified in charging him interest at the enhanced rate.¹

Where a debt due by *A* to *B* is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B*'s separate obligation to *C*, *A* cannot claim under Section 8 that his debt to *C* is a renewal of the debt to *B*, *C* not being the same creditor as *B* nor an assign of *B* in respect of *A*'s original debt.²

Law revision.—Performance of the conditions of a proposal is, under Section 8 of the Indian Contract Act, an acceptance of the proposal. A partial performance of the conditions on the part of the offeree may not be in a given case of any value at all to the proposer, and yet if the proposer chooses to revoke his proposal when the offeree has already undertaken the performance of the conditions as prescribed by the proposer or has even far advanced in the performance thereof, inconvenience and loss will accrue to the offeree. If in the given circumstances the proposer revokes his proposal, the Court will award damages in favour of the offeree. To give statutory recognition to the rights of the offeree in the given circumstances, the English Law Revision Committee recommended the introduction of the following rule :

“A promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon the performance of the act, unless the promise includes expressly or by necessary implication a term that it can be revoked before the act has been completed.”³

Fifth Indian Law Commission.—The Commission suggested the adoption of the aforesaid recommendation of the English Law Revision Committee in the Indian Contract Act.⁴ The Commission accordingly suggests that the existing Section 8, of the Indian Contract Act, should be renumbered as sub-section (1) of Section 8, and that after sub-section (1), as so redrafted, the following should be inserted as sub-section (2) thereof :

“(2) In the case of a promise made in consideration of the promisee's performing an act, the promisee's entering upon the performance of the act is an acceptance of the proposal, unless the promise contains an express or implied term that it can be revoked before the act has been completed.”⁵

This proposal of the Commission, when implemented, will no doubt give a statutory recognition to a common law rule now followed in Courts.

9. In so far as the proposal or acceptance of any promise is

Promises, express
and implied.

made in words, the promise is said to be express.

In so far as such proposal or acceptance is made
otherwise than in words, the promise is said to be implied.

1. *Gaddar Mal v. Tata Industrial Bank, Ltd.*, (1927) 49 All. 674 : A.I.R. 1927 All. 407.

2. *Papaiah v. Ramapunniah*, A.I.R. 1942 Mad. 12.

3. Sixth Interim Report, p. 31, paragraph 50, Recommendation No. 7.

4. Para. 32 of the Thirteenth Report.

5. Appendix I (Proposals in the form of draft amendments).

Express promises.—A contract may be either express or implied. ✓ A contract may also be of a mixed character, that is, partly expressed in words and partly implied from acts of the parties and circumstances.¹ Where the proposal or acceptance of any promise has been made in words, the promise is said to be express. ✓ Contracts which are completely set forth in words either by mouth or writing are called express.² Thus if the word 'or' occurring in the first sentence of Section 9 of the Indian Contract Act implies a disjunctive sense, then a contract which is of a mixed character, that is, partly expressed in words and partly implied from acts of the parties and circumstances, is an express promise under the Indian law of contract. If 'or' means 'and', express promises will mean contracts which are completely set forth in words either by mouth or writing. The word 'or' occurring in the second sentence of Section 9 similarly may have been used either in the disjunctive sense or conjunctive. If used in a disjunctive sense, an implied promise under the Indian law of contract includes promises that are partly express and partly implied. This discussion as to dichotomy is, however, purely academic, for, where a contract is unenforceable by law, it makes no difference whether the contract is express or implied.³

An express contract can be proved by written or spoken words which constitute an agreement between the parties. Where a contract has been made otherwise than in words it is known as an implied contract. ✓ An express contract 'means the reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulation which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties. Section 35 of the Sale of Goods Act, 1930, imports into all contracts of sale of goods a term that the seller is not bound to deliver the goods until the buyer applies for delivery which may be negatived only by actual words used in the bargain between them or a true construction of those words.⁴ As to implied contracts between mortgagor and mortgagee, see Section 65 of the Transfer of Property Act, 1882.

Implied promises.—Where the proposal or acceptance of a promise has been made otherwise than in words, the promise is said to be implied. A proposal, or, as it is sometimes called, an offer, may be express or may be implied from the conduct of the party.⁵ ✓ A mere mental assent to the terms of a proposal is not an acceptance of it.⁶

✓ Contracts which are either wholly or partly not set forth in words either by mouth or writing are called implied contracts. A contract or part of a

1. *Gulab Singh v. Punjab Zamindara Bank Ltd.*, A.I.R. 1942 Lah. 47.
2. *Meherulla v. Sariatulla*, (1930) 57 Cal. 1093.
3. *Meherulla v. Sariatulla*, (1930) 57 Cal. 1093.
4. *Ramamoorthy v. Satyanarayana*, A.I.R. 1958 Andhra 550.
5. *Clarke v. Dunraven (Earl)*, *The Satinita*, [1897] A.C. 59, H.L.
6. *Brogden v. Metropolitan Rail Co.*, (1877) 2 App. Cas. 666, 691, H.L.; *Household Fire and Carriage Accident Insurance Co. v. Grant*, (1879) 4 Ex. D. 216, 221, C.A.

contract is implied by the parties where they show by their conduct that it is contemplated and intended by them though not expressed in terms.¹

✓ Implied contracts are inferred from the conduct or presumed intention of the parties. ✓ An implied contract may be proved by circumstantial evidence of an agreement. ✓ Implied promises exist only where there is no express promise between the parties. *Expressum facit cessare tacitum*.² There can be no implied contract as to matters covered by an express contract until the express contract is displaced.³ It is not enough that the express and the tacit are merely incongruous; It must be clear that they cannot reasonably co-exist.⁴ Similarly, the terms of a document can be incorporated by reference when they are not inconsistent with the express terms of the incorporating document or are not repugnant to the transaction which that document represents. Thus, an arbitration clause in one contract can be imported into a subsequent contract provided that when it is so imported it is not inconsistent with the terms of the subsequent contract.⁵

In contracts of carriage the printed conditions as per the ticket or other similar document are deemed to be imported into contracts although they have not been specifically agreed upon by both the parties, provided however the ticket or the other similar document is an integral part of the contract and provided that reasonable steps have been taken to bring the conditions to the notice of the party sought to be bound.⁶ Conditions contained in or referred to by a mere receipt or other similar document which is not an integral part of the contract will not be binding.⁷

✓ Where a party has signed a document which forms part of the contract and contains or refers to conditions, he will be bound by those conditions whether he reads them or not, unless he has been induced to sign the document by fraud or misrepresentation.⁸

Where a party so conducts himself that a reasonable man would believe that the party in question was assenting to the terms as proposed by the

1. *Nelson (James) and Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, [1908] A.C. 108 H.L.; *Upton-on-Severn R. D. C. v. Powell*, [1942] 1 All E.R. 220 C.A.; *British Bank for Foreign Trade, Ltd. v. Novinex, Ltd.*, [1949] 1 K.B. 623 C.A.; [1949] 1 All E.R. 155.

2. *Cutter v. Powell*, (1795) 6 T.R. 320, 324; *Button v. Thompson*, (1869) L.R. 4 C.P. 330, 340.

3. *Steven v. Bromley*, [1919] 2 K.B. 722, 727; *Hart v. Mills*, (1846) 15 M. and W. 87; *Chandris v. Isbrandtsen-Moller Co., Inc.* [1951] 1 K.B. 240; *Ferguson v. Carrington*, (1829) 9 B. and C. 59; *Selway v. Fogg*, (1839) 5 M. and W. 83.

4. *Lowe v. Dorling and Son*, [1906] 2 K.B. 772, C.A.

5. *Dwarkanadas and Co. v. Daluram Gogamulle (F. B.)*, A.I.R. 1951 Cal. 10 (*Chatturbhuj v. Basdeodas*, 47 Cal. 799; A.I.R. 1921 Cal. 767; 60 I.C. 909 overruled); *Vali Mahomed Ayob v. Shamdeo Gopiram*, A.I.R. 1930 Cal. 774; 34 C.W.N. 447 approved).

6. *Thompson v. London, Midland and Scottish Rail Co.*, [1930] 1 K.B. 41 C.A.; *Hood v. Anchor Line (Henderson Bros.), Ltd.*, [1918] A.C. 837, H.L.

7. *Chapleton v. Barry*, [1940] 1 K.B. 532 C.A.; [1940] 1 All E.R. 536; *Taylor v. Glasgow Corporation*, 1952 S.C. 440; *Amritsar Transport Co. Ltd. v. Sohanlal*, A.I.R. 1957 J. and K. 7.

8. *L'Estrange v. Graucob (F.), Ltd*, [1934] 2 K.B. 394, 403; *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805 C.A.; [1951] 1 All E.R. 631.

other party, the party who has so conducted himself, whatever his real intention may have been, is bound by the contract as if he had intended to agree to the other party's terms.¹

✓ It is necessary that the person accepting an offer should notify his acceptance to the person making it, except where the offer is made in consideration of some act to be done by the person to whom it is made, and a notification of his acceptance of the terms of the offer is expressly or impliedly dispensed with by the person making the offer. The offer of a railway company to carry passengers is accepted by anyone who took a ticket.²

In English law, the term "implied contract" is not only applied to contracts which are inferred from the conduct or presumed intention of the parties but also to obligations imposed by implication of law. This legal imposition may be there notwithstanding the presence of any intention to the contrary, whether expressed or presumed, on the part of the party sought to be bound. Thus, where a husband has unjustifiably turned away or deserted his wife, and a tradesman supplies her with necessaries, he is entitled to sue the husband for the price on an implied contract, notwithstanding that he may have received express instructions from the husband not to give credit to the wife.³

Nearly every contract, of necessity, leaves matters which are to be implied. Such contracts must therefore be construed with reference to the surrounding circumstances and the parties who made them.⁴

The acquiescence of the appellants for 9 years in the mode of charging interest entitled the respondents to set up an implied agreement on the appellants' part to pay it in that way.⁵ The mere sending of a notice by a bank to one of its customers that the interest charged on overdrafts against surety held by the bank had been raised is not of itself sufficient to render the customer liable to pay the enhanced rate. But where, after receiving notice that the rate of interest has been raised, the customer borrows more money from the bank, the bank is justified in charging him interest at the enhanced rate.⁶

Where deposit is made in advance there is evidently an implied agreement that the amount would be refundable if not appropriated and the depositee becomes a debtor for the purpose of the payment of the money to the person entitled to get back the deposit. Under the circumstances, the depositee is liable to make the refund at the place where the depositor resides.⁷

1. *Caledonian Rail Co. v. Stein and Co., Ltd.*, 1919 S.C. 324; *Sullivan v. Constable*, (1932), 48 T.L.R. 369 C.A.

2. *Denton v. Great Northern Rail Co.*, (1856), 5 E. and B. 860.

3. *Wilson v. Glossop*, (1888) 20 Q.B.D. 354 C.A.; *Hunt v. De Blaquiere* (1829), 5 Bing. 550; *Bradshaw v. Beard* (1862), 12 C.B.N.S. 344; *Weingarten v. Engel*, [1947] 1 All E.R. 425.

4. *Jiwibai v. Ramkuwar (F. B.)*, A.I.R. 1947 Nagpur 17.

5. *Haridas Ranchordas v. Mercantile Bank of India*, (1920) 44 Bom. 474 P.C.

6. *Gaddar Mal v. Tata Industrial Bank, Ltd.*, (1927) 49 All. 674; A.I.R. 1927 All. 407.

7. *Union of India v. Bhagwan Industries, Ltd.*, A.I.R. 1957 All. 799; (*Gappatal v. Kanderwal*, (1955) M.B. 141; A.I.R. 1955 M.B. 96—*relied on*).

In a contract it was stated that the Railway Administration would not be liable for anything that might happen to the supplier's commodities until the same passed into the physical possession of the Railway Administration as a buyer, and not as a carrier, at the place of delivery noted in the Purchase Order. There was thus a clear indication that the parties intended to keep the liability of the railway as a carrier distinct and separate from its liability as a buyer. The liability of the railway as a carrier could not, therefore, be taken into account in considering its rights as a buyer. In the absence of any contract, express or implied, in the agreement that the supply of wagons by the railway would be a condition precedent to the supply of commodities by the supplier, such an implied contract could not be inferred.¹

Law revision.—A promise is express when it has been made wholly in words whether by mouth or writing. A contract will be called "express" where the proposal as well as its acceptance ultimately constituting the contract have been made in words whether by mouth or writing. As noted earlier, a contract or promise may be of a mixed character, that is, partly express and partly implied. Where the proposal or the acceptance of the proposal has been made otherwise than in words, that is, effected by conduct of the parties or inferred as effected from their presumed intention, it will be an implied promise. Thus, in an implied promise either the proposal or the acceptance of the proposal or both the proposal and its acceptance may be made otherwise than in words, that is, effected or inferable as effected from the conduct of the parties or their presumed intention. Even a part of the proposal or a part of the acceptance if made otherwise than in words will result in what is known as an implied contract. The expression "the proposal or acceptance of any promise" obviously means proposal or acceptance in any promise. This equation of "of" and "in" poses no problem. But unless the word "or" in the expression "the proposal or acceptance of any promise" means "and", the definition of express and implied promises will not be exact. In fact, the definition, as it reads, leaves the class of promises that are of a mixed character, that is, the promises that are partly express and partly implied, as coverable under the appellation of both express and implied promises. It may be proposed, therefore, that the expression "the proposal or acceptance of any promise" in Section 9 should be replaced by the expression "the proposal *and* acceptance *in* any promise". The proposed suggestion, if implemented, will make the sense of the definition of express and implied promises clear.

The Fifth Indian Law Commission.—From paragraph 33 of the Thirteenth Report of the Commission and Appendix I (Proposals in the form of draft amendments) thereto it appears that Section 9 of the Contract Act did not receive an adequate examination in the hands of the Commission.

1. *Union of India v. Vasudeo*, A.I.R. 1960 Patna 87.

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

What agreements
are contracts.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Contract.—Under Section 2(h), an agreement enforceable by law is a contract. Section 10 seeks to describe the classes of agreements that are enforceable by law, and are, therefore, contracts. As to the varied aspects of the concept of 'contract', see under Section 2(h), *ante*.

✓ According to Section 10, all agreements are contracts if they are made (a) by the free consent of the parties, (b) who are competent to contract, and if they are made (c) for a lawful consideration and (d) with a lawful object; and are (e) not declared to be void under the Indian Contract Act.] Section 10 also declares that if any law requires a particular class of contracts to be made in writing they will be so made. If any class of contracts are required to be made in the presence of witnesses, under any law, they will be so made. Where the law of registration requires that a particular class of contracts will be made only through the medium of registered documents, registration is obligatory for that class of contracts. Even apart from the law of contract, a given contract may be declared void under any other law, whether statutory¹ or common law. All agreements are not contracts.² }

In the absence of any provision of the Indian Contract Act, or any other Act requiring a particular class of contracts to be made in any particular way, a contract may be made wholly by words of mouth or in writing or partly by words of mouth and partly by words in writing.

Free consent has been defined in Section 14. Section 11 describes the persons who are competent to contract. Lawful consideration and lawful objects have been defined in Section 23. Under Section 19, agreements without the basis of free consent are voidable. A contract induced by undue influence is also voidable under Section 19A. Sections 20, 21, 24-30 and Sections 35-36 describe the circumstances in which a contract will be void.

Under Section 2(h), *ante*, it has been seen that the modern welfare State of India has imposed many statutory obligations on particular classes of citizens. For details, see *Statutory obligations, ibid*.

1. *Union of India v. Himco India P. Ltd.*, A.I.R. 1965 Cal. 404. (arbitration clause).

2. *Jaganputra v. Kalelkar*, A.I.R. 1965 Bom. 146.

As to the law requiring particular classes of contracts to be made in writing, or in the presence of witnesses or in the medium of registered documents, see *Transfer of property* and *Registration* under Section 2(h), *ante*. See also under Sections 20-21, 24-30, and 35-36, *post*.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract.

Persons competent to contract.—A person is competent to contract if he is of the age of majority according to the law to which he is subject, and is of sound mind and is not disqualified from contracting by any law to which he is subject.

In the absence of a disability to the contrary, any person is capable of entering into a contract. Because of legal disability, complete or partial, certain classes of persons are in law incompetent to contract, or are only capable of contracting to a limited extent or in a particular manner.

Section 11 aims at defining inherent competency to contract. It does not cover cases of agents and representatives who though competent to contract, are contracting for and on behalf of others and as such may be under certain restrictions which though not affecting their inherent capacity to contract may only restrict their power to bind others. Thus where a party is not competent to contract within the meaning of Section 11, no contract can come into existence with such a party. Such is not however the case with a person who is competent to contract under Section 11 even though some restrictions on his power to contract are imposed by some other law. ✓ A person acting under certain statutory restrictions can enter into a valid contract if the prescribed formalities have been observed.¹

Ratification. ✓ A void agreement cannot be ratified.² As a general rule, a person or a body of persons not competent to authorise an act cannot give it validity by ratifying it. A ratification in law is treated as equivalent to a previous authority.³

✓ There can be no valid ratification when the knowledge of the person making it regarding the facts of the case is materially defective. The mere fact that a minor executed an acknowledgment on attaining majority did not

1. *Dharmeshwar v. Union of India*, A.I.R. 1955 Assam 86.

2. *Maganlal v. Ramanlal*, A.I.R. 1943 Bom. 362; *Gregson v. Uday Aditya*, 17 Cal. 223; 16 I.A. 221; *A.-G. v. Great Eastern Ry. Co.*, (1880) 5 App. Cas. 473, 478; *Ashbury Railway Carriage Company v. Riche*, (1875), L.R. 7 H.L. 653; *Malan v. Mohan*, A.I.R. 1935 Lah. 547.

3. *Tukaram v. Madhorao*, A.I.R. 1948 Nagpur 293; *Irvine v. Union Bank of Australia*, (1877) 3 Cal. 280 P.C.; 4 I.A. 86; *Govind Ram v. Piram Ditta*, (F.B.), 16 Lah. 546; A.I.R. 1935 Lah. 561; *Nazir Ahmad v. Jiwandas*, 177 I.C. 388; A.I.R. 1938 Lah. 159; *Suraj Narain v. Sukhu Ahir*, (F.B.), 51 All. 164; A.I.R. 1928 All. 440; *Bindeshari v. Chandika*, 49 All. 137; A.I.R. 1927 All. 242.

import knowledge of the minor that the person who executed prior acknowledgment during his minority was not his guardian and had no authority to execute it on his behalf.¹

The position of a person whose estate is taken under an Agency management and who is in consequence declared by a notification to be incompetent to enter into any contract involving him in any pecuniary liability is like that of a minor. If such person in spite of the incompetency enters into such a contract, the contract is a nullity and unenforceable at law; no question of its ratification arises. The consideration which passed under the earlier contract cannot be imported into the contract into which he enters after the estate is released from the Agency control.²

Where the minor was not in a position to give authority at the date when the acts were performed for the reason that a minor cannot contract or perform other legal acts based on a contract, he cannot subsequently ratify these acts because the whole question of ratification is based on the assumption that authority could have been conferred at the date when the acts were performed. Subsequent acknowledgments by minors on attaining majority do not amount to ratification of acknowledgment given by his *de facto* guardian during his minority.³

Where a minor borrowed a sum of money, executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan plus interest thereon, a suit upon the second bond was not maintainable as that bond was without consideration and did not come under Section 25 (2) of the Contract Act.⁴

Person.—Under Section 3(42) of the General Clauses Act, 1897, “person” includes any company or association or body of individuals whether incorporated or not.

A party to a contract must be a person recognised as such in law. Corporations as well as individuals, when not disqualified under the law, are legal entities and are, therefore, capable of being parties to a contract. Independent juristic personality can be conferred upon an association of persons by or under a statute. When an association is lacking in juristic personality, it is incapable as an association of being a party to a contract.⁵ A *vihare* (Buddhist temple) in Ceylon is not a juristic person. It is not a corporation and has no legal personality and cannot accept and own property.⁶ The word ‘person’ as defined in Section 3(42) of the General Clauses Act, 1897, includes ‘Government’ for the purposes of the Indian Contract Act.⁷

1. *Tukaram v. Madhorao*, A.I.R. 1948 Nagpur 293.

2. *Jethalal v. Laxmanwala*, A.I.R. 1953 Sau. 177.

3. *Tukaram v. Madhorao*, A.I.R. 1948 Nag. 293; *Irvine v. Union Bank of Australia*, (1877) 3 Cal. 280 P.C. : 4 I.A. 86.

4. *Suraj Narain v. Sukhu Ahir*, (F.B.), (1928) 51 All. 164 : A.I.R. 1928 All. 440.

5. *Bradley Egg Farm, Ltd. v. Clifford*, [1943] 2 All E.R. 378; *Bonsor v. Musicians' Union*, [1955] 3 W.L.R. 788 : [1955] 3 All E.R. 518 : [1956] A.C. 104.

6. *Thero v. Wijewardena*, [1961] 2 W.L.R. 954.

7. *State of U. P. v. Kanhaiya Lal*, A.I.R. 1956 All. 983.

Persons of unsound mind. ✓ A person who is not of sound mind is not competent to contract. Soundness of mind is a matter of degree. Section 12 of the Contract Act defines a sound mind for the purposes of contracting. See Section 12, *post*.

Corporations.¹—“Corporation” is that which the civilians call *universitatem*, or *collegium*, and is a body politic authorised to take and grant, having a common seal, etc. A corporation or body politic is an artificial person established for preserving in perpetual succession certain rights, which being conferred on natural persons only would fail in process of time. It is either aggregate, consisting of many members, or sole, consisting of one person only, as a person. ✓ A corporation enjoys a legal entity, sues and is sued by its corporate name, and holds and enjoys property by such name. It is by virtue of the sovereign’s prerogative exercised by a charter, or an Act of Parliament (or of Legislature) or of prescription, that the artificial personage called a corporation, whether sole or aggregate, civil or ecclesiastical, or mixed, is created.

In England, it is a general rule that a corporation must contract under its common seal, but whenever the observance of this rule would occasion great inconvenience, or tend to defeat the very purpose of the business, it is not observed : e.g., the retainer of an inferior servant, the acceptance of bills of exchange, or making of promissory notes by companies incorporated for the purpose of trade, or the doing of acts frequently occurring ; in these cases, the affixing of the common seal is not necessary.

The powers of a corporation, created by Act of Parliament, are limited to those which are expressly conferred by the Act, or which by necessary implication are included in the express powers. A statutory corporation can do such acts only as are authorised, directly or indirectly, by the statute creating it ; a corporation incorporated by royal character can do everything that an ordinary individual can do. If however the corporation by charter be made later subject to an Act, then its acts will be regulated by provisions of law.

✓ A corporate body cannot act beyond its powers. It cannot do beyond what it is meant to do. The statute creating a corporation defines its powers and functions. The statutory prescriptions for its acts and contracts are imperative and essential to their validity.² Non-compliance with statutory requirements renders the contract with or by a corporation unenforceable.³

1. Wharton: *Law Lexicon*, 14th edn., 1953, 262 : Stroud’s *Judicial Dictionary*, 3rd edn., 1952, vol. 1, 643.

2. *Wenlock (Baroness) v. River Dee Co.* (1887), 36 Ch. D. 674, 685. *Mathura Mohan v. Ram Kumar* (1916), 43 Cal. 790. *Harda Municipality v. Harda Electric Supply Co.* A.I.R. 1964 M.P. 101. *Bhikraj v. Union of India* A.I.R. 1962 S.C. 113. *H. S. Rikhy v. New Delhi Municipality* A.I.R. 1962 S.C. 554. *Young & Co. v. Corporation of Royal Leamington Spa* (1883) 8 A.C. 517 : 52 L.J.Q.B. 713.

3. *Wright & Son, Ltd. v. Romford Corporation*, [1956] 3 All E.R. 785. *Harī Vishnu v. Ahmad Ishaque* A.I.R. 1955 S.C. 233. See *The English Corporate Bodies’ Contract Act*, 1960.

Where a contract has been entered into by a corporation with another party and the said contract though connected with a subject-matter which is within the scope and object of the corporation has not been embodied in the prescribed form, and the said contract has been performed by one of the parties, an action will lie against the party which has benefited from the said performance.¹ No action however lies against any of the parties when no benefit has been received by any of them and the contract remains an executory one.² In the case of a statutory person who is incompetent to make any contract except in compliance with the formalities prescribed by the statute, there is no inherent disqualification or incompetency to make a contract as in the case of a minor or lunatic. In the case of a contract by such a statutory person the applicability of Section 65 of the Indian Contract Act is not barred.³

Partnership.—The distinction between corporations and trading partnerships is, that in the first [the law sees only the body corporate] and knows not the individuals,] who are not liable for the contracts of the corporation in their private capacity, their [share in the capital] only being at stake; but in the latter the law looks, not to the partnership, but to the individual members of it, who are, therefore, answerable for the debts of the firm to the full extent of their assets.

A contract can only be bilateral and the same party cannot be a party on both sides. There can hardly be a contract between *A* on the one side and *A* and *B* on the other, particularly a contract of employment. A partner cannot be an employee of the firm.⁴

Partnership is a matter of construction. Receipt of profit is not a conclusive test of partnership.⁵

Companies.—For the purposes of the law of contract, 'company' includes 'existing company', 'private company', 'public company', 'holding company', and 'subsidiary company'. As to the definition of these classes of companies, see Sections 3 and 4 of the Companies Act, 1956.

On the registration of the memorandum of a company, the Registrar certifies that [the company is incorporated.] From the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, become a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the com-

1. *Clarke v. Cuckfield Union* (1852) 21 L.J. (Q.B.) 349; *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772; *Nicholson v. Bradfield Union* (1886), L.R. 1 Q.B. 620; *Paine v. Strand Union*, (1846) 8 Q.B. 326.

2. *Kidderminster Corporation v. Hardwick* (1873), L.R. 9 Exch. 13.

3. *Ram Nagina v. Governor-General in Council*, A.I.R. 1952 Cal. 306.

4. *Magnus v. Commissioner of Income-tax*, A.I.R. 1958 Bom. 467.

5. *In the matter of Abdul Rahiman*, A.I.R. 1928 Mad. 890.

pany in the event of its being wound up as is mentioned in the Companies Act, 1956.¹ 'Body corporate' or 'corporation' includes a company incorporated outside India but does not include a corporation sole.² 'Trading corporation' means a trading corporation within the meaning of entries 43 and 44 in List I in the Seventh Schedule to the Constitution.³

Contracts on behalf of a company may be made as follows⁴ :

(a) A contract which, if made between private persons, would by law be required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged ;

(b) A contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

A contract made according to Section 46 of the Companies Act, 1956, will bind the company.

A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in or outside India.

A deed signed by such an attorney on behalf of the company and under his seal where sealing is required, will bind the company and have the same effect as if it were under its common seal.⁵

A bill of exchange, *hundi* or promissory note will be deemed to have been made, accepted, drawn or endorsed on behalf of a company if drawn, accepted, made or endorsed in the name of, or on behalf or on account of, the company by any person acting under its authority, express or implied.⁶

The shares or other interest of any member in a company are movable property, transferable in the manner provided by the articles of the company.⁷

Every person, being the managing agent, secretaries and treasurers, manager or other agent of a public company or of a private company which is a subsidiary of a public company, who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal, is required at the time of entering into the contract, to make a memorandum in writing of the terms of the contract, and to specify therein the person with whom it is entered into.

1. Section 34, *ibid.* ; as to the mode of forming an incorporated company under the Companies Act, 1956, see Section 12, *ibid.*

2. Section 2(7), *ibid.*

3. Section 2(49), *ibid.*

4. Section 46, *ibid.*

5. Section 48, *ibid.*

6. Section 47, *ibid.*

7. Section 82, *ibid.*

Every such person who enters into a contract as aforesaid is required forthwith to deliver the memorandum to the company and to send copies thereof to each of the directors; and such memorandum should be filed in the office of the company and laid before the Board of directors at its next meeting.¹

If default is made in complying with the requirements of the law as indicated above, the contract will, at the option of the company, be voidable as against the company.

The powers and functions of a company incorporated under an Act are circumscribed by its memorandum of association.² An act done beyond the scope prescribed in the memorandum of association is *ultra vires* and therefore void.³ When an act is *ultra vires*, it cannot be ratified by the directors or share-holders in order to make it binding on the company.⁴

Societies.—The registration of a society under the Co-operative Societies Act, 1912, renders it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.⁵ [A co-operative society registered under the Co-operative Societies Act, 1912, is a corporation. It has to be sued in its corporate name only.⁶ The Multi-Unit Co-operative Societies Act, 1942, provides for the incorporation, regulation and winding up of co-operative societies with objects not confined to one State. Where a person incurs loans on promissory notes in his capacity as secretary of a co-operative society which is unregistered and it is shown that the loans were utilised by the society, a suit by the creditor to recover the money due on the pronotes should be brought against all the members of the society. No one particular member can be singled out for recovering the claim of the creditor.⁷

Every society registered under the Societies Registration Act, 1860, may sue or be sued in the name of the president, chairman or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion. It will however be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.⁸

1. Section 416, *ibid.*

2. Section 13(c), *ibid.*

3. *A.-G. v. Great Eastern Ry. Co.*, (1880) 5 App. Cas. 473, 478.

4. *Ashbury Railway Carriage Company v. Riche* (1875), L.R. 7 H.L. 653.

5. Section 18, *ibid.*

6. *Narayana v. Easwara*, A.I.R. 1961 Ker. 258.

7. *Nalin Behari v. Bisweswar*, A.I.R. 1961 Cal. 393; *Ganesha v. Mundi Forest Co.* (1899) 21 All. 346, and *Bhagwandas v. Pinjira Pole*, A.I.R. 1927 All. 789 *relied on*.

8. Section 6, *ibid.*

As to the societies which may be registered under Societies Registration Act, 1860, see Section 20, *ibid.* In Bihar, after the words "science, literature" in Section 20 of the Societies Registration Act, 1860, (the Central Act), the words "industry, agriculture" have been inserted.¹

Clubs².—[Unincorporated societies, clubs, associations, and institutions have no legal entity, and therefore cannot as such enter into any contract.] In the absence of any enabling statute they are not juristic persons, and therefore can neither sue nor be sued on contracts made in their name or on their behalf; nor can they, in the absence of any statutory provision, authorise an officer to sue or be sued on their behalf on such contracts, even if their rules purport to give them power to do so.

For work done or goods supplied to unincorporated bodies the liability is governed by the rules which apply to contracts made through an agent. Only such persons can be held liable as actually gave the order for the work or the goods or who either expressly or impliedly authorised the giving of the order on their behalf, or who ratified the order after it had been given. For the work done on the basis of a resolution of an unincorporated building society a member who joined in the resolution will be held liable.³

The executive committee of an unincorporated society may be liable for the negligent performance of a contract by its servant.

When, however, a creditor looks for payment not to any of the members of the unincorporated association but to a particular fund, he can only have recourse to that fund and cannot make the members liable on the contract.⁴

[An unincorporated body, like club or society cannot be sued except in the names of all the individuals composing it. The liability of an individual member of a club for debts incurred by the club depends upon whether he has in any way pledged his personal credit.⁵] An action to recover the price of goods supplied to a member of a non-proprietary club, or on his responsibility cannot be brought in the name of the secretary of the club.⁶ The secretary of a club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the club by his predecessor in office; nor could the members of a club collectively be sued through their secretary as their representative.⁷ In *Payne v. Bradley*, [1961] 3 W. L. R. 281 H. L., under the rules of the club no surplus of the funds was divisible among the members individually, yet where the proceeds of the gaming were paid into the general funds of the

1. The Societies Registration (Bihar Amdt.) Act, 1959, Section 6.

2. Halsbury : *Laws of England*, 3rd ed. vol. 8, 1954, 64-65.

3. *Longman v. Hill (Lord)* (1891), 7 T.L.R. 639; *Braithwaite v. Skofield* (1829), 9 B. & C. 401; *Bradley Egg Farm, Ltd. v. Clifford*, [1943] 2 All E.R. 378. C.A. Cheshire & Fifoot. *Law of Contract*, 6th Ed., 1964, 364.

4. *Morley v. Makin* (1905) 54 W.R. 395.

5. *Ranzor Singh v. Hebbert* (1891) 26 Punj. Rec. No. 15 (civil). *Balakrishna v. Babu* A.I.R. 1949 Pat. 184.

6. *Michael v. Briggs* (1891) 14 Mad. 362.

7. *N.-W. P. Club v. Sadullah* (1898) 20 All. 497. *Ganesha v. Mundi Forest Company* (1899) 21 All. 346. *Bhagwandas v. Pinjra Pole Pashu Anathalaya* A.I.R. 1927 All. 789.

club, which was a member's club, and appeared in the profit and loss account out of which the general expenses of the club were met, each individual member thereof was deemed to have derived a personal gain from the proceeds.

Unregistered society can hold property. It can sue or be sued. There are, no doubt, great difficulties about suing it because it is necessary to sue it as a joint body, and to implead all the members thereof.¹

[An unregistered body cannot sue or be sued as a corporation] all its members must be impleaded, and therefore a partition of property belonging to an unregistered body without issuing notice to all its members is not binding on the members not served.²

Where a company was not registered under Act No. VI of 1882, a plaintiff bringing a suit against such company would be required to make each individual member of the company a defendant to the suit; and he could not escape from this obligation by stating in his plaint that he had been unable to discover who the individual members of the company were.³

[A voluntary association can claim to exercise jurisdiction, both over its members and over non-members, on the basis of tacit promises. The members will be presumed to have submitted to the said jurisdiction of the association by their subscription to the rules of the said association.] They may also have indicated an *ad hoc* submission to the said jurisdiction.⁴

As to special status of a trade union see, *Bonsor v. Musicians' Union*, [1956] A.C. 104; [1955] 3 All E.R. 518: [1955] 3 W.L.R. 788.

The Government.—The object of the Contract Act requires that the word 'person' should have an extended sense and it includes 'Government'. There is no reason for excluding from the ambit of the definition of person in Section 3 of the General Clauses Act, the body of individuals, "the Government" responsible for the governance of a State or the Union.⁵

The executive power of the Union and of the States extends to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contract for any purpose.⁶

The Government of the Union of India or of a State may sue or be sued by the name of the Union of India or of the State.⁷

Article 299 of the Constitution requires that all contracts made in the exercise of the executive power of the Union must be expressed to be made by the President. All such contracts and all assurances of property made in the exercise of the power of the Union must be executed on behalf of the President by such persons and in such manner as the President may direct or

1. *Bhagwandas v. Pinjra Pole Pashu Anathalaya*, A.I.R. 1927 All. 789.

2. *Ram Sarup v. Arya Samaj of Dhampur*, A.I.R. 1925 All. 337: (1925) 47 All. 342.

3. *Ganesha v. Mundi Forest Company* (1899) 21 All. 346.

4. Cheshire & Fifoot, *Law of Contract*, 5th ed., 1960, 55.

5. *State of U. P. v. Kanhaiya Lal*, A.I.R. 1956 All. 383.

6. Article 298 of the Constitution.

7. Article 300, *ibid.*

authorise. (The President will not be personally liable) in respect of any contract or assurance made or executed for the purposes of the Constitution of India or for the purposes of any enactment relating to the Government of India that had preceded the commencement of the Constitution. (A person making or executing any such contract or assurance on behalf of the President will not be personally liable in respect thereof.)

Similarly, under the same Article, all contracts in the exercise of the executive power of a State must be expressed to be made by the Governor of the State. All such contracts and all assurances of property made in the exercise of the executive power of the State must be executed on behalf of the Governor by such persons and in such manner as the Governor may direct or authorise. The Governor will not be personally liable in respect of any contract or assurance made or executed for the purposes of the Constitution of India or for the purposes of any enactment relating to the Government of India that preceded the commencement of the Constitution. Any person making or executing any such contract or assurance on behalf of the Governor will not be personally liable in respect thereof.

Article 299 of the Constitution prescribes some formalities to be observed in order to render a contract or assurance by or with the Union or a State enforceable. Non-compliance with statutory requirements renders the contract unenforceable.¹ The provisions of Article 299 (1) are intended to safeguard Government against unauthorised contracts. An officer entering into a contract on behalf of Government can also safeguard himself by having recourse to the proper form. Where the existence of a contract is to be found out from correspondence, ordinarily, the rule is that the entire bunch of correspondence that passed between the parties has to be looked into for determining whether there was a concluded contract. The rule has however no application in a case in which the contract has to be evinced by a formal document in compliance with Article 299 of the Constitution. The provisions of Article 299 are mandatory and not directory. A contract which does not comply with the formalities prescribed by Article 299 is unenforceable in law.² In order to reach a binding agreement to which the Government, whether of the Union or of a State, is a party, the parties must have a written contract satisfying all the requirements of Article 299. From the wordings of Article 299(1) it appears that contracts to be made in exercise of

1. *Wright & Son, Ltd. v. Romford Corporation*, [1956] 3 All E.R. 785; *Chatturbhuj v. Moreshwar*, [1954] S.C.R. 817, 835; A.I.R. 1954 S.C. 236; *Damodar v. Union of India*, A.I.R. 1959 Cal. 526. *Sankaran v. State of Kerala*, (F. B.), A.I.R. 1963 Kerala 278. *State of West Bengal v. B. K. Mondal*, A.I.R. 1962 S.C. 779. *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254. *Kamalia Mills v. State of Bihar*, A.I.R. 1963 Patna 153. *State of Madras v. Mehta*, A.I.R. 1964 Mad. 508.

2. *Damodar v. Union of India*, A.I.R. 1959 Cal. 526; *Chatturbhuj v. Moreshwar* [1954] S.C.R. 817; A.I.R. 1954 S.C. 236. *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254. *Union of India v. Gilkan & Co.*, A.I.R. 1962 Punj. 423. *Kamalia Mills v. State of Bihar*, A.I.R. 1963 Patna 153. *Hindustan Construction Co. v. State of Bihar (F.B.)*, A.I.R. 1962 Patna 336.

the executive power of the Union or of a State do not require to be compulsorily embodied in the form of deeds as the term is understood in English law. Under the Indian Constitution, a contract under Article 299 will be adequately made if it is made in writing, is expressed to be made by the President, Governor or Rajpramukh, and executed on behalf of such head of the Union or State by authorised persons and in authorised manner. As to the relief under an unenforceable contract under Article 299 *see* under Section 65, *post*, and also under Section 70, *post*.

The prescription of the necessary formalities was found indispensable also under the Government of India Act, 1935, and the Government of India, 1915, as subsequently amended. The provisions of Section 30 of the Government of India Act, 1915, as subsequently amended, were mandatory, and for a contract to be enforceable by or against the Secretary of State its terms had to be complied with. An oral contract was not within the purview of Section 30, and sub-section (2) of the said Section implied the execution of a document and excluded oral contracts. A contract to satisfy the conditions of Section 30 had not however to be incorporated in a formal deed or to be under seal; it might well be entered into by correspondence and by less formal documents. It would be sufficient compliance with the terms of Section 30 if the agreement was expressed in writing and the writing might comprise of a series of letters or a series of informal documents.¹ While subscribing to this view as to the interpretation of Section 30 of the Government of India Act, 1915, as subsequently amended, their Lordships in *Devi Prasad v. Secretary of State*² observed that in the case of contract entered into by the Government officers on behalf of the Government with third parties the practice of leaving the agreement in the form of correspondence and tenders in anticipation of a formal deed to be executed later on was irregular and had nothing to recommend. The proper procedure in the public interest and desirable from every point of view should be, their Lordships observed, that after an agreement was reached, a memorandum of the agreement should be contemporaneously prepared and signed by the parties as evidence of the agreement to be followed later by a formal document drawn up by a Government conveyancer.

There was a controversy on the question whether the contract should be expressed by a formal deed or whether it was a sufficient compliance of the Statute if the agreement was in writing, though not expressed by a formal deed. In a number of decisions³ the view was expressed that to comply with

1. *Devi Prasad v. Secretary of State*, (1941) All. 741 : A.I.R. 1941 All. 377 ; *Secretary of State v. Bhagwandas*, A.I.R. 1938 Bom. 168 : 174 I.C. 316 : 40 Bom. L.R. 19. *Union of India v. Rallia Ram*, A.I.R. 1963 S.C. 1685. *Britania Buildings & Iron Co. v. State of Orissa*, A.I.R. 1962 Orissa 117.

2. [1941] All. 741 : A.I.R. 1941 All. 377.

3. *Municipal Corporation of Bombay v. Secretary of State*, (1934) 58 Bom. 660 : A.I.R. 1934 Bom. 277 : 152 I.C. 947 ; *Secretary of State v. Yadvagir Dharamgir*, 60 Bom. 42 : 37 Bom. L.R. 931 : A.I.R. 1936 Bom. 19 : 160 I.C. 505 ; *Krishnaji v. Secretary of State*, 39 Bom. L.R. 807 : A.I.R. 1937 Bom. 449 : 172 I.C. 451 ; *Sankara Mining Syndicate, Ltd. v. Secretary of State*, A.I.R.

the provisions of Section 30 of the Government of India Act, 1915, as subsequently amended, a formal deed was necessary and a contract within the terms of that Section could not be spelt out of correspondence or out of a series of letters and other informal documents.

Under the Government of India Act, 1935, also, an agreement which was not in the form prescribed by Section 175(3) of the Act of 1935 was unenforceable in law and, therefore, void under Section 2(g) of the Contract Act.¹ No legal or contractual liability could be enforced against the Government unless there was a specific contract drawn up and signed duly by or on behalf of the Government as provided under Section 175 of the Act of 1935.² The provisions of Section 175 were mandatory and excluded oral contracts and required the contract to be embodied in writing which *ex facie* show that the contract was entered into by the Government or on behalf of the Government. Beyond the requirement that it must be expressed to be made by the Governor-General or the Governor of the Province and executed on behalf of the Governor-General or the Governor of the Province by such person and in such manner as the Governor-General or the Governor might direct or authorise there was no further requirement that the contract should be incorporated in a formal deed or be under seal. It might validly be made by correspondence or by tender and its acceptance or by informal documents.³

As to succession to property, assets, rights, liabilities and obligations by the Union and the States, *see* Articles 294 and 295 of the Constitution. As to the borrowing by the Union and the States, *see* Articles 292 and 293 respectively.

Minors incompetent to contract.—Under the Indian Contract Act, Section 11, (a person who has not attained his majority is not competent to contract.) A contract entered into with a minor is a nullity for want of legal competency. Unless otherwise provided by statute, a contract with a minor is not enforceable and it does not give rise to any rights or liabilities. It is *non est*.⁴ As a minor has not the capacity to contract he cannot make a valid and enforceable contract, irrespective of the fact whether the contract was a completed and executed contract and was to his advantage and benefit or

1938 Mad. 749; 183 I.C. 839; (1938) 2 M.L.J. 141; *Secretary of State v. Chettyar Firm*, 4 Rang. 291; A.I.R. 1927-Rang. 14; 98 I.C. 323; *Secretary of State v. G. T. Sarin & Co.*, 11 Lah. 375; A.I.R. 1930 Lah. 364; 120 I.C. 615; 31 P.L.R. 765.

1. *New Churulia Coal Co. Ltd. v. Union of India*, A.I.R. 1956 Cal. 138; *Province of W. B. v. Mohan Lal*, A.I.R. 1961 Cal. 663; *State of West Bengal v. B. K. Mondal and Sons*, A.I.R. 1962 S.C. 779; *Sankaran v. State of Kerala (F. B.)*, A.I.R. 1963 Kerala 278. *Bhikraj v. Union of India*, A.I.R. 1962 S.C. 113.

2. *Union of India v. Bank of the East, Ltd.*, A.I.R. 1954 Assam 23; *State of West Bengal v. B. K. Mondal*, A.I.R. 1962 S.C. 779; *Union of India v. Gilkan and Co.*, A.I.R. 1962 Punj. 423.

3. *Namayya v. Union of India*, A.I.R. 1958 Andhra 533; *Union of India v. B. C. Nawn Ltd.*, A.I.R. 1961 Cal. 620; *Union of India v. Rallia Ram*, A.I.R. 1963 S.C. 1685; *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254.

4. *Latcharao v. Bhimayya*, A.I.R. 1956 Andhra 182.

not.¹ In a suit by a promisee for enforcement of specific performance of a contract it is necessary that the parties should have the capacity to contract.² Any sale transaction entered into by a minor is void and unenforceable.³ A mortgage made by a minor is void; and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid; Sections 64 and 65 of the Contract Act being based on there being a contract between competent parties, and being inapplicable to a case where there is not, and could not have been, any contract at all.⁴

A person who parted with his goods can trace them into the hands of the *quondam* minor and recover them back in *specie*, for he has not lost his title to them. But he can not seek to recover their price or damages, for, if allowed, he would be indirectly asking for the enforcement of contract and recover damage for the breach. Nor can a person, who lends money to such a minor, recover it. If allowed to do so, the Court would be enforcing a contract of loan. Nor can Section 65 of the Contract Act be invoked as it presupposes the existence of a contract between persons with legal competency.⁵ Conveyances in favour of persons incompetent to contract stand however on a different footing. Even though a person may be disqualified to enter into a contract such disqualification does not debar that person from being a transferee under a conveyance. Different considerations apply when the matter passes from the domain of contract into that of conveyance. It is on this ground that even though a minor is incompetent to enter into a contract no such disability attaches to him in the matter of a transfer of property, and, therefore, a sale-deed executed in his favour is valid and enforceable.⁶ Where a mortgage-deed has been executed in favour of a minor and the entire mortgage money is paid by the minor the mortgage is enforceable in law.⁷ A contract in England by which an infant acquires an interest in a subject of a permanent nature or which imposes continuing obligations upon him, is voidable at his option. He must, however, in England, take positive steps to repudiate it at the latest within a reasonable time after attaining his majority.⁸ In India the Limitation Act, 1963, prescribes the time limit.

1. *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P.C. : 30 I.A. 114 P.C. ; *Ramanna . . Mallappa*, 28 Deccan L.R. 557 ; *Bhagwan Das v. Sheik Husain (F.B.)*, 39 Deccan L.R. 110 ; *Bhim Mandal v. Magaram*, A.I.R. 1961 Patna 21 ; *Padma Vithoba v. Md. Multani*, A.I.R. 1963 S.C. 70.

2. *Jatadhari v. Kishun Lal*, A.I.R. 1950 Patna 535.

3. *Dyaviah v. Shivamma*, A.I.R. 1959 Mysore 188.

4. *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 : 30 I.A. 114 P.C. ; *Thurstan v. Nottingham Permanent Benefit Building Society*, [1902] 1 Ch. 1 : [1903] A.C. 6 ; *Bhim Mandal v. Magaram*, A.I.R. 1961 Patna. 21. *Kamta Prasad v. Sheo Gopal*, (1904) 26 All. 342.

5. *Latcharao v. Bhimayya*, A.I.R. 1956 Andhra 182 ; *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 : 30 I.A. 114 P.C.

6. *Collector of Meerut v. Haridan Singh*, A.I.R. 1945 All. 156.

7. *Raghava v. Raghava (F.B.)*, 40 Mad. 308 : A.I.R. 1917 Mad. 630 ; 31 M.L.J. 575 : 36 I.C. 921 : 20 M.L.T. 407.

8. *Carter v. Silber. Carter v. Hasluck*, [1892] 2 Ch. 278.

Estoppel.—An infant inducing a person to contract with him by means of a false representation that he was of full age is not estopped under Section 115 of the Evidence Act, from proving that he was really a minor on the date of the contract.¹

Contracts by minors are void. Before the Specific Relief Act, 1963, which came into force with effect from 1st March, 1964,² the only ground on which equity interfered to make a person of full age return money or property which he obtained during minority was fraud. Where money was obtained by a minor misrepresenting his age, it amounted to a fraud and he might be made to refund it. In the absence of fraud or misrepresentation by the minor as to his age he could not be directed to return the money he had obtained. Relief could not be claimed on general equitable grounds apart from the statute. Thus apart from the rule stated in Section 41 of the Specific Relief Act, 1877, there was no provision of law under which relief could be claimed against a minor on the basis of a contract entered into by him.³ Now see Section 33 of the Specific Relief Act, 1963.

The liability to pay compensation to the vendee before getting possession of the property conveyed was a statutory obligation created by Section 41 of the Specific Relief Act, 1877, and did not rest on any equities. A sale deed executed by a minor was liable to be cancelled by him after he attained majority but before granting him possession the Court could put him on terms.⁴ Now Section 33 of the Specific Relief Act, 1963, gives the Court the power to require the benefit to be restored or compensation to be made when an instrument is cancelled or is successfully resisted as being void or voidable.

The Indian Majority Act, 1875.—Except for marriage, dower, divorce and adoption and religion or religious rites and usages of any class of citizens of India, a person is deemed, in the case of persons domiciled in India, to have attained his majority when he completed his age of eighteen years and not before. Every minor of whose person or property, or both, a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been assumed by any Court of Wards before the minor has attained that age, shall notwithstanding anything contained in the Indian Succession Act, 1865, or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

1. *Manmatha v. Exchange Loan Co. Ltd.* A.I.R. 1936 Cal. 567; *Gokuldas v. Gulab Rao* A.I.R. 1926 Nag. 108; *Tikki Lal v. Komalchand* A.I.R. 1940 Nag. 327; *Wasinda Ram v. Sita Ram* (1920) 1 Lahore 389; *Mohori Bibee v. Dharmodas Ghose* (1903) 30 Cal. 539 P.C.

2. *Vaikuntarama v. Authimoolam* (1915) 38 Mad. 1071; A.I.R. 1914 Mad. 641.

3. *Batchu v. Chepuri* A.I.R. 1959 Andhra 100; *Raghavayya v. Subbaya*, A.I.R. 1919 Mad. 1129.

4. *Raghavayya v. Subbaya*, A.I.R. 1919 Mad. 1129.

The Apprentices Act, 1961.—The Apprentices Act, 1850, has been repealed and replaced by the Apprentices Act, 1961. This last mentioned Act provides for the regulation and control of training of apprentices in trades and for matters connected therewith. Under Section 3 of the Act, a person shall not be qualified for being engaged apprentice to undergo apprenticeship training in any designated trade, unless he—(a) is not less than fourteen years of age, and (b) satisfies such standards of education and physical fitness as may be prescribed: Provided that different standards may be prescribed in relation to apprenticeship training in different designated trades. As to contracts of apprenticeship, see Section 4, *ibid.* As to termination of apprenticeship contracts, see Section 7, *ibid.* As to the settlement of disputes or disagreements between an employer and an apprentice, see Section 20, *ibid.*

In England, a contract of service or of apprenticeship, or a contract closely analogous thereto, is binding upon an infant provided that in the opinion of the Court it is, when construed as a whole, substantially for his benefit.¹

The Hindu Minority and Guardianship Act, 1956.—The Act amends and codifies certain parts of the law relating to minority and guardianship among Hindus. The provisions of this Act are in addition to, and not, save as expressly provided, in derogation of, the Guardians and Wards Act, 1890. The Hindu Minority and Guardianship Act, 1956, applies to any person who is a Hindu by religion in any of its forms of developments, or who is a Buddhist, Jaina or Sikh by religion, or who is domiciled in India except the State of Jammu and Kashmir but is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with in the Act if it had not been passed. As to who are Hindus, Buddhists, Jainas or Sikhs by religion see the Explanation to Section 3, *ibid.* Unless the Central Government, by notification in the Official Gazette, otherwise directs, the provisions of the Hindu Minority and Guardianship Act, 1956, do not apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution.

A minor under the Hindu Minority and Guardianship Act, 1956, means a person who has not completed the age of eighteen years. 'Guardian' under the Act means a person having the care of the person of a minor or of his property or of both his person and property and includes:

- (i) a natural guardian that is,
- (a) the father of a boy or of an unmarried girl, and after the father, the mother;
- (b) the mother of an illegitimate boy or of an illegitimate unmarried girl, and after the mother, the father; and
- (c) the husband of a married girl.

A person ceasing to be a Hindu, Buddhist, Jaina or Sikh will not be entitled

1. *Doyle v. White City Stadium, Ltd.*, [1935] 1 K.B. 110.

to act as the natural guardian of a minor. Where the natural guardian completely and finally renounces the world by becoming a hermit or an ascetic, he is not entitled to act as the natural guardian of the minor. For the purposes of guardianship, "father" and "mother" do not include "step-father" or "step-mother". The adoptive father, and after him, the adoptive mother becomes the natural guardian of an adopted son who is a minor ;

(ii) a guardian appointed by the will of the minor's father or mother ;

(iii) a guardian appointed or declared by a court ; and

(iv) a person empowered to act as such by or under any enactment relating to any Court of Wards.

The natural guardian of a minor under the Hindu Minority and Guardianship Act, 1956, has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate ; but the guardian can in no case bind the minor by a personal covenant. The natural guardian cannot, however, without the previous permission of the Court, that is, City Civil Court, District Court or a Court empowered under Section 4A of the Guardians and Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made or any portion thereof is situate, mortgage or charge or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor. Neither can he lease, without the previous permission of the Court, any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2) of Section 8 of the Act is voidable at the instance of the minor or any person claiming under him. The Court will not grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) of Section 8 of the Act except in case of necessity or for an evident advantage to the minor. No person is entitled to dispose of, or deal with, the property of a minor merely on the ground of his or her being the *de facto* guardian of the minor.

A guardian appointed by will of the father or the mother under Section 9 of the Act has the right to act as the minor's guardian and to exercise all the rights of a natural guardian under the Act to such extent and subject to such restrictions, if any, as are specified in the Act and in the will.

The Guardians and Wards Act, 1890.—The Act extends to the whole of India except the State of Jammu and Kashmir. In the case of a minor, subject to other later Acts, the Guardians and Wards Act, 1890, does not take away or derogate from any power to appoint a guardian of his person or property, or both, which is valid by the law to which the minor is subject. On an application under Section 8, the Court, when satisfied that it will be for the welfare of a minor, will make an order appointing a guardian of his person or property, or both, or declaring a person to be such a guardian. An order so appointing or declaring a guardian implies the removal of any guardian who has not been appointed by will or other instrument or appointed or declared

by the Court. Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under Section 7 of the Act appointing or declaring another person to be guardian in his stead will not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of the Act. Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under the Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.¹ Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he is not entitled, without the previous permission of the Court, to mortgage, or charge or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward or lease any part of that property for a term exceeding five years or for any term exceeding more than one year beyond the date on which the ward ceases to be a minor.² A disposal of immovable property by a guardian in contravention of the foregoing restrictive provisions is voidable at the instance of any person affected thereby.³ The Court will not grant the necessary permission except in case of necessity or for an evident advantage to the ward.⁴

A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by the Act, he is not entitled to make any profit out of his office.⁵ The fiduciary relation of a guardian to his ward extends to and affects purchases by the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.⁶

For minors.—On the question whether and how far a minor can make a contract through his guardian distinction has been made as between the various grades of guardians. The guardians who can, within certain limits, make disposition of minor's immovable property are the father, his executor, grand-father, his executor, or guardian appointed by the Court. Guardians like the mother, the uncle, the elder brother, etc., are termed de facto guardians and are deemed to be usually without authority to dispose of or

1. Section 28 of the Guardians and Wards Act, 1890.

2. Section 29, *ibid.*

3. Section 30, *ibid.*

4. Section 31, *ibid.*

5. Section 20(1), *ibid.*

6. Section 20(2), *ibid.*

bind the minor for the purchase of immovable property. A *de jure* guardian has power to dispose of minor's immovable property though this power is subject to stringent conditions, all governed by the basic and fundamental principle that the acts of the guardian should be to the advantage and benefit of the minor and his estate. For fulfilling the actual wants of the minor and for his bringing up and maintenance as well as for the preservation of his property the *de jure* guardians are empowered to dispose of certain immovable property of the minor. Otherwise, even dispositions by such guardians are not considered valid.¹ Conversely, acquisition of a property for the minor if the contract for the same is for the benefit of the minor and it is actually completed so as to transfer the ownership of the property to the minor has been held to be valid. Contracts entered on behalf of minors by their guardians can be specifically enforced by or against the minor if the guardian is competent to make a contract binding on the minor and the contract is for the benefit of the minor.² If this test is satisfied no distinction is to be made between a contract for sale and a contract for purchase entered into on behalf of a minor.³ The earlier view⁴ of the Privy Council that it is not within the competence of the guardian of the minor to bind the minor or the minor's estate by contract for the purchase of immovable property and that the minor is consequently not bound by the contract and that there being no mutuality he cannot after attaining majority obtain a specific performance of the contract has to be accepted in the light of the later cases as referred to above.

Following this restrictive view⁵ it had been held that the natural guardian of a Hindu minor is not competent to bind the minor or his estate by a contract for sale even though it may be for necessity or for the benefit of the minor. The contract, therefore, is not specifically enforceable against the minor after his attaining the age of majority. Ratification of the contract by the minor in such a case must be with full knowledge of his rights after attaining majority.⁶ This view of the law, even after the Hindu Minority and Guardianship Act, 1956, is not tenable in view of its unreasonableness as well as of the advice of the Judicial Committee of the Privy Council as represented in *Sri Kakulam Subrahmanyam v. Subba Rao*,⁷ and other cases. The competence of the guardian and the interest of the minor will determine

1. *Imambandi v. Haji Mutsaddi*, 45 Cal. 878 P.C. : A.I.R. 1918 P.C. 11 ; *Pratap v. Sant*, A.I.R. 1938 P.C. 181 ; *Manu v. Sukhlalia*, A.I.R. 1958 Patna 79.

2. *Sundararaja v. Pattanathusami*, (1894) 17 Mad. 306 ; *Branson v. Appasami*, (1894) 17 Mad. 257.

3. *Amir Ahnmad v. Nizam Ali*, (F.B.), A.I.R. 1952 Hyd. 120 ; *Subrahmanyam v. Subba Rao*, (1949) Mad. 141 : A.I.R. 1948 P.C. 95.

4. *Mir Sarwarjan v. Fakhruddin*, 39 Cal. 232 : 39 I.A. 1 P.C.

5. *Mir Sarwarjan v. Fakhruddin*, 39 Cal. 232 P.C. : 39 I.A. 1 P.C. ; *Gulab Das v. Collector of Surat*, 3 Bom. 186 P.C. : 6 I.A. 54 ; *Srinath v. Jatindra*, A.I.R. 1926 Cal. 445 : 89 I.G. 892.

6. *Hari Mohan v. Sew Narayan*, A.I.R. 1949 Assam. 57 ; *Rambilas v. Lokenath*, A.I.R. 1949 Patna 405.

7. (1949) Mad. 141 : A.I.R. 1948 P.C. 95.

the efficacy of a transaction entered into on behalf of the minor whether it is a contract for the sale or purchase of property. The present position is that though a minor who has agreed to purchase property through his guardian cannot generally sue for the specific performance of the contract, where the guardian is a *de jure* guardian and is competent to bind the minor by his contract and the contract is also for the obvious benefit of the minor, the minor can bring such a suit.¹ In case of sale of immovable property of the minor the Hindu Minority and Guardianship Act, 1956, imposes some restrictions on the natural guardians of the Hindu, Buddhist, Sikh and Jaina minors. *De facto* guardians are absolutely prohibited.

A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. Capacity is the creation of law whereas authority is derived from the act of the parties. The guardian of a Hindu minor, now subject to the Hindu Minority and Guardianship Act, 1956, can only function within the doctrine of legal necessity or benefit. The validity of the transaction will be judged with reference to the scope of his power to enter into a contract on behalf of the minor. Even then personal liability arising out of the guardian's contract is the liability of the minor's estate only.²

Under the Hindu Law, the guardian or the manager is competent, subject to the Hindu Minority and Guardianship Act, 1956, to alienate the property of the minor. In such a case the contract can be specifically enforced by or against the minor if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him, and, further, if it is for the benefit of minor.³

A guardian cannot impose a personal liability on his ward and therefore a minor cannot be bound by a personal covenant in a contract entered into by his guardian.⁴ The minor's personal law may however affect the position. For instance, the natural guardian of a Hindu minor, prior to the Hindu Minority and Guardianship Act, 1956, which applies to Hindus, Sikhs, Buddhists and Jains, had power without the Court's sanction to mortgage or sell any part of the minor's estate in case of need or for the benefit of the estate. In cases of necessity the guardian of a Hindu minor may borrow money upon a promissory note and the minor's estate is liable for repayment with interest at a proper rate. The minor is not liable on the note, but on the debt evidenced by the note. His liability is created by his personal law.⁵

1. *Amir Ahmad v. Nizam Ali*, (F.B.), A.I.R. 1952 Hyd. 120 ; *Srikakulam Subrahmanyam v. Subba Rao*, (1949) Mad. 141 : A.I.R. 1948 P.C. 95.

2. *Suryaprakasam v. Gangaraju*, (F.B.), A.I.R. 1956 Andhra.

3. *Rajubala v. Nidhuram*, A.I.R. 1960 Cal. 65 (*Subrahmanyam v. Subba Rao*, (1949) Mad. 141 : A.I.R. 1948 P.C. 95 relied on).

4. *Rajaratna v. Mahboob Sahib*, A.I.R. 1940 Mad. 106 ; *Waghela Rajasangi v. Shekh Masludin*, (1887) 11 Bom. 551 ; 14 I.A. 89 ; *Indur Chunder v. Radhakishore*, (1892) 19 Cal. 507 ; 19 I.A. 90.

5. *Rajaratna v. Mahboob Sahib*, A.I.R. 1940 Mad. 106 ; *Hanoomanpersaud v. Baboo Munraj*, 6 M.I.A. 393 P.C. : 18 W.R. 81 : 2 Suther. 29 ; *Annamalai v. Muthuswami*, A.I.R. 1939 Mad. 538 : (1939) 1 M.L.J. 792.

Subject to the Hindu Minority and Guardianship Act, 1956, a Hindu minor is bound by a contract entered into by his mother guardian on his behalf for sale of his property for purposes considered under Hindu Law as necessary; such a contract can be enforced against him.¹

A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract or the nature of the contract, the contract is incapable of being enforced against one party, the other party is, generally incapable of enforcing it.² Section 20 (4) of the Specific Relief Act, 1963, lays down that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. In spite of this general provision in the Specific Relief Act, 1963, the general principles of the law of contract remain unaffected.

Where a minor has received a benefit from a contract of sale entered into on his behalf by his father the vendee will be entitled to specific performance of the contract.³ The contract can be specifically enforced by or against the minor if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, if it is for the benefit of the minor or is a legal necessity for him. If either of these two conditions is wanting, the contract cannot be specifically enforced. The want of mutuality does not stand in the way of granting specific performance in the given circumstances, by or against a minor.⁴

No decree can be passed against a minor or his estate on a contract entered into on his behalf by a guardian under which no charge is created on the estate except in such cases where the minor's estate would be liable for the obligation incurred by the guardian under the personal law to which he is subject.⁵

A guardian cannot enter into a personal contract imposing liability on a minor.⁶ An agreement to re-unite cannot be made on behalf of a person

1. *Ramalingam v. Bavanambal*, A.I.R. 1951 Mad. 431; *Sreeramulu v. Pundarikakshayya*, (1949) F.L.J. 288; A.I.R. 1949 F.C. 218.

2. *Ramalinga v. Jagadammal*, A.I.R. 1951 Mad. 612. *Mir Sarwarjan v. Fakhruddin*, (1912) 39 Cal. 232 P. C.; *Venkatachalam v. Sethuram*, A.I.R. 1933 Mad. 322 (F. B.); *Venkatasami v. Annamalai*, A.I.R. 1964 Mad. 474; *Bholanath v. Balbhadra*, A.I.R. 1964 All. 527.

3. *Gujoba v. Nilkanth*, A.I.R. 1958 Bom. 202; *Subrahmanyam v. Subba Rao*, (1949) Mad. 141; A.I.R. 1948 P.C. 95 followed.

4. *Gujoba v. Nilkanth*, A.I.R. 1958 Bom. 202; *Ramalingam v. Bavanambal*, A.I.R. 1951 Mad. 431; *Lachuram v. Madharam*, A.I.R. 1962 Assam 41. *Subrahmanyam v. Subba Rao*, A.I.R. 1948 P.C. 95

5. *Ramdayal v. Prayagdas*, A.I.R. 1954 Nag. 122; *Tukaram v. Ramchandra*, 2 Nag. L.R. 25; *Ramchandra v. Rupchand*, 23 Nag. L.R. 94; A.I.R. 1927 Nag. 296; *Jhiti Bai v. Tejmal*, 13 Nag. L.R. 109; A.I.R. 1916 Nag. 11.

6. *Waghela Rajsanji v. Shekh Masludin*, 11 Bom. 551 (P.C.); 14 I.A. 89; *Khimji Kuwerji v. Lalji Karamsi*, A.I.R. 1941 Bom. 129.

during his minority.¹

A betrothal in Hindu Law is a promise to give a girl in marriage, and its form is that of a promise by the father or guardian of the girl in favour of the bridegroom and/or the bridegroom's father or guardian. No ceremonies are essential to the validity of a betrothal as they are in the case of a marriage. A betrothal is a revocable promise of marriage, though such revocation would be improper without a just cause, such as where a better suitor is forthcoming for the girl. A betrothal can also be broken off if either party is found to be of a lower caste or to have an incurable disease, or the intended husband is found to be unfit or the girl is found to be unchaste or for other reasons. A contract of betrothal cannot be specifically enforced. The party injured by the breach is entitled to recover compensation for any pecuniary damages that may have been sustained and also for any injury to character or prospects in life which may naturally arise in normal course of the breach.

A marriage by exchange or a '*sata*' marriage is prohibited by the Hindu Shastras and is not known to the strict Hindu law. In order to make the transaction invalid according to the Hindu law there must be a contract making the one betrothal strictly conditional upon the other betrothal, so as to make it a real bargain or set off of the girls as two objects of value.

Contracts of betrothal entered into on behalf of minors by their guardians and shown to be for their benefit are enforceable at the instance of the minors.²

Where the father of a minor daughter enters into a contract of service on her behalf with the defendant, the contract is void for being without consideration. If the girl were a major, instead of a minor, such a promise to serve would be good consideration within the meaning of Section 2 (d) though the consideration moved from the third party. Where the girl is a minor, under Section 11 she is not competent to contract and her promise would not be enforceable against her. Consequently, her promise to serve will supply no consideration for the promise of the defendant to pay her a salary.³ The promise of infants is not held to be a promise in law or to constitute a consideration for another promise.

There being no contract enforceable at law, there can be no breach on the part of the defendant in respect of which the minor girl or her father can sue for damages.

A purchased property with minor's money in his own name and mortgaged it to B. In execution of a simple money decree against A, this property was purchased by P, subject to the mortgage of B. The minor then brought a suit under Order 21, Rule 63, of the Civil Procedure Code against P to establish his rights. After the filing of the suit and before it was decided in

1. *Balabux v. Rukhmabai*, (1903) 30 Cal. 725 P.C.

2. *Khimji Kuverji v. Lalji Karamsi*, A.I.R. 1941 Bom. 129.

3. *Raj Rani v. Prem Adib*, A.I.R. 1949 Bom. 215; *Raghava v. Srinivasa*, 40 Mad. 308 : A.I.R. 1917 Mad. 630.

the minor's favour *P* was required to pay money due under the mortgage to *B*. The minor's suit was successful and *P* had to deliver the property to him. *P* brought a suit against the minor and *B*, requiring them to repay the amount he had paid under the mortgage. It was held that *A* having no authority to mortgage the minor's property, *P* was not entitled to have the property charged for money paid by him to *B*, and therefore he had no relief either against the minor or his property.¹ Both *P* and *B* were under a mistaken belief that a valid mortgage had been created. *P* therefore was entitled under Section 72 of the Contract Act to a decree for repayment as against *B*.² *B* could not obtain any relief against the minor.³

Under the Mahomedan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian has no power to convey to another any right or interest in immovable property which the transferee can enforce against an infant.

A deed of family settlement to which a Mahomedan minor is a party represented by his brother as *de facto* guardian is void and not binding on the minor, irrespective of the consideration that it benefited him or that the arrangement was followed for a long period.⁴

The mere fact that a person shares in the profits and advances money to another person who carries on business would not make him a partner in the business. The guardian of a minor can thus advance money belonging to the minor to other persons for earning profit for the minor. Such a contract cannot be said to be void or invalid.⁵

A compromise made on behalf of a minor without having complied with the requirements of Section 462 of the Civil Procedure Code, 1882, as to obtaining leave of the Court, is not enforceable against the minor.⁶ A Hindu mother, while her adopted son was a minor and had a guardian of property appointed to him by the Court, alienated some of the minor's property, treating it as her own. The sale was set aside. The purchase money paid by the vendee to the mother was not recoverable from the son.⁷ A mortgagor employing an attorney who also acted for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney; and therefore where the Court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy, or was put upon an enquiry as to it, held, that the mortgagee was not entitled to compensation under Sections 38

1. *Suryanarayana v. Purnachandra*, A.I.R. 1946 Mad. 150 ; *Ammani Ammal v. Ramaswami Naidu*, A.I.R. 1919 Mad. 105 : 51 I.C. 57 : 37 M.L.J. 113.

2. *Sowdra Bai v. Saraswati*, (1942) Mad. 669 : A.I.R. 1942 Mad. 590 : 204 I.C. 169.

3. *Ammani Ammal v. Ramaswami Naidu*, A.I.R. 1919 Mad. 105 : 51 I.C. 57 : 37 M.L.J. 113.

4. *Mohd. Amin v. Vakil Ahmad*, A.I.R. 1952 S.C. 358 ; *Immambandi v. Haji Mutsaddi*, 45 I.A. 73 : A.I.R. 1918 P.C. 11 relied on.

5. *Gutsaran v. Serai Kumar*, A.I.R. 1956 All. 136.

6. *Jamna Bai v. Vasanta Rao*, (1916) 39 Mad. 409 P.C.

7. *Nathu v. Balwantrao*, (1903) 27 Bom. 390.

and 41 of the 'Specific Relief Act of 1877.¹ Now see Sections 30 and 33 of the Specific Relief Act, 1963.

The contract to purchase immovable property entered into by the guardian on behalf of a minor cannot be specifically enforced by minor.² Now see Section 20 (4) of the Specific Relief Act, 1963, referred to before, which has been made effective on and from 1 March, 1964. Apart from the question of restoration or compensation in the suit for cancellation of an instrument, the general law of contract remains unaffected in spite of the Specific Relief Act, 1963.

Minors and others.—The mere fact that a joint bond executed as a part of a compromise is not enforceable against a minor executant of a bond does not absolve the major executant from liability.³ Where a person is jointly interested in an estate with another person who is incompetent to deal with his property and the former purports to deal with the entirety, specific performance will not be granted against him even as to his share. In such a case plaintiff's only remedy is by way of damages.⁴ A deed of settlement which is void *qua* the minor is void altogether *qua* all of the parties including those who were *sui juris*.⁵

Where the sureties represent to the plaintiff that the principal is competent to contract and make him enter into a contract with the principal, agreeing to compensate him if the sureties' representations proved false or any defect was discovered in the contract thereafter, the sureties must under the terms of their contract compensate the plaintiff. The suretyship contract in the instant case is a collateral and almost an independent contract and can be enforced.⁶

The doctrine of mutuality will apply only to instances where the contract is with regard to separate property of the minor alone and not where he is a co-parcener in a joint Hindu family or a co-tenant with other adults and the contract is with respect to such co-parcenary or co-tenancy properties.⁷ This is an old case. Now see Section 20 (4) of the Specific Relief Act, 1963, with effect from 1 March, 1964. Though the doctrine of mutuality has been rendered inoperative by the Specific Relief Act, 1963, the general provisions of the Indian Contract Act, 1872, remain unaffected, and an invalid contract remains invalid. Contract made by the karta of joint family on his behalf is binding on adult members of the family but not the minor.⁸ *V* and his three infant sons constituted an undivided trading Hindu family. In certain

1. *Brohmo Dutt v. Dharmo Das*, (1899) 26 Cal. 381.

2. *Lachuram v. Madharam*, A.I.R. 1962 Assam 41.

3. *Sheonandan v. Shahdeo*, A.I.R. 1940 Patna 671; *Jamnabai v. Vasanta Rao*, (1916) 39 Mad. 409; A.I.R. 1916 P.C. 2 : 34 I.C. 216 : 43 I.A. 99.

4. *Rambilas v. Lokenath*, A.I.R. 1949 Patna 405; *Lumley v. Ravenscroft*, 64 L.J. Q.B. 441; *Abdul Haq v. Mohammad Yehia*, A.I.R. 1924 Patna 81 : 78 I.C. 483.

5. *Mohd. Amin, v. Vakil Ahmad*, A.I.R. 1952 S.C. 358.

6. *Tikki Lal v. Komalchand*, A.I.R. 1940 Nag. 327; *Kashiba v. Shripat*, 19 Bom. 697.

7. *Sitarama v. Venkatarama*, (F.B.), A.I.R. 1956 Madras 261.

8. *Nripendrachandra v. Ekbarali*, (1930) 57 Cal. 268.

given circumstances, decrees against *V* were considered as to have exhausted the plaintiff's remedy, and a second suit against the sons of *V* was not found maintainable.¹

Partnership and minors.—As a minor is incompetent to contract he cannot be a partner in the firm.² There can be no partnership between the same individual acting on the one hand as the guardian of the minor and on the other as a partner in his or her individual capacity.³ A partnership with a minor is void, and it cannot be ratified by a minor even when he attains majority.⁴

Minors cannot enter into a contract of partnership. Where they have not only been admitted to the benefits of a partnership but are made contracting parties through their guardians, the contract is invalid and inoperative against them. Where one of the terms of the agreement is that the plaintiff would have an eight annas share in the interest and the five defendants between themselves would have a joint interest in the remaining eight annas, and if by reason of the minority of some of the defendants the agreement is to be regarded as invalid and inoperative so far as they are concerned, no valid, workable or intelligible contract would survive so far as it concerns the remaining parties.⁵

Though a minor is incompetent to contract and thus cannot be a partner in the firm, he can be admitted to the benefits of a partnership where one has already been in existence independently of the minor.⁶

Under Section 30 of the Partnership Act, 1932, it is open to the partners to admit a minor to the benefits of the partnership. Agreements entered into between several persons, some of whom are by law incompetent to contract, are not necessarily wholly null and void, but are only less effective than if all the parties to it were competent to contract. Thus in a partnership where some partners are adults and some minors, the partnership will be a valid one as between the adult partners. As regards the minor partners, it will be held as a matter of construction of the said deed of partnership that the minor partners were admitted to the benefits of the partnership. The clause, where any, in the deed that all the partners including the minors, would be liable for the loss borne by the partnership will have no legal effect so far as the minor partners are concerned, because in the eye of the law the minor cannot become a partner or become liable for losses. The minor is only entitled to the benefit of profits according to his share. There is no bar to such a partnership being registered under Section 26-A of the Income-Tax Act.⁷

1. *Gurusami v. Samurti*; *Gurusami v. Sadasiva*, (1882) 5 Mad. 37.

2. *Chhotelal v. Rajmal*, A.I.R. 1951 Nagpur 448.

3. *Meenakshi v. Subramanian*, A.I.R. 1957 Mad. 8.

4. *Maganlal v. Ramanlal*, A.I.R. 1943 Bom. 362.

5. *Durga Charan v. Akkari Das*, A.I.R. 1949 Cal. 617.

6. *Chhotelal v. Rajmal*, A.I.R. 1951 Nagpur 448; *A. Khan v. Amaer Khan*, A.I.R. 1952 Mysore 131.

7. *Sahai Bros. v. Commissioner of Income-Tax*, A.I.R. 1958 Pat. 177.

R entered into partnership with *U* when *R* was minor by 9 days. Partnership continued for over 10 years and profits were divided between *U* and *R* for the first 3 years. On dissolution of partnership in 1935, the stock-in-trade and the creditors were divided. Accounts were however to be taken. *U* then sued for accounts for transactions by the firm after *R* had become major. *U* was held to be entitled to have accounts with respect to transactions since *R* became major.¹

Infants in England².—‘Infans’, in Latin, means one who cannot speak. Under the English law, ‘Infant’ means a person under twenty-one years of age, whose acts are in many cases either void or voidable. The word ‘minor’ is used in Scotland. ‘Infants, or minor—whom we call any that is under the age of 21 years.’³ This is the sense in which the word is used in Infants Relief Act, 1874. There is no distinction between a minor in this sense and an infant. The law knows no distinction between infants of tender and of mature years.⁴

At English common law, the contracts of infants are divided into three classes: (a) Those that are absolutely void: such as are positively injurious to the interests of the infant, and can only operate to his prejudice, as a surety-bond, or a release to his guardian;

(b) Those which are only voidable: such as are beneficial to him, which he may affirm or avoid when he comes of age; as a conveyance of lands, a promissory note, an account stated;

(c) Those which are binding *ab initio* and need no ratification: such as contracts for the public service, articles of apprenticeship,⁵ executed contracts of marriage, representative acts as executor or trustee, contracts for necessities.

The Law of Property legislation of 1925, the Law of Property Act, 1925, and the Settled Land Act, 1925, for example, introduced some modifications into the law relating to infants.

Section 1 of the English Infants Relief Act, 1874, provides that all contracts, whether by specialty or by simple contract entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than necessities), and all accounts stated with infants will be absolutely void. A guarantee by a third person in respect of a loan advanced to an infant is also void. There being no debt due from the principal debtor, namely, the infant, the guarantee is without the basis of any consideration.⁶ Neither can an action be brought to charge any person upon any promise made after full age to pay any debt contracted during

1. *Maganlal v. Ramanlal*, A.I.R. 1943 Bom. 362; *Gregson v. Uday Aditya*, 17 Cal. 223; 16 I.A. 221.

2. Wharton: *Law Lexicon*, 14th edn., 1953, 508, 658; Stroud: *Judicial Dictionary*, 3d edn., 1952, vol. 2, 1442.

3. Co. Litt. 2. b.

4. *Per Parke, B., Morgan v. Thorne*, 7 M. & W. 408.

5. See, *Green v. Thompson*, [1899] 2 Q.B. 1.

6. *Coutts & Co. v. Browns-Lecky*, [1947] K.B. 104; [1946] 2 All E.R. 207.

infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.¹ Where however a fresh promise has been made by a person after attaining majority and quite independently of any promise that may have been made during his infancy, the fresh promise so made will be binding upon the person.²

The contracts by an infant that are absolutely void under the Infants Relief Act, 1874, can under the English common law, be sued on by the infant, though not by the other party. The infant cannot however bring an action for specific performance for such contract. The money paid or goods delivered by an infant in pursuance of such contract are not recoverable by him, except where he has received no consideration at all.³ An infant is, further, protected from any action in tort directly connected with a void contract. Where the tort is directly connected with the void contract, the infant is not liable; where the tort is not so connected he will be liable. A breach by an infant of a contract which is void cannot be converted into a tort.⁴

An infant, though generally liable *ex delicto*, is not liable for a tort directly connected with a void or voidable contract. This direct connection exists wherever the act complained of is of the same nature as that contemplated by the contract.⁵ In *Fawcett v. Smethurst* the defendant while a minor hired a motor car from the plaintiff for the purpose of driving from *Stranraer* to *Cairn Ryan* and back, but in fact drove further. He went to *Ballantrae*. Upon the return journey, without any negligence on the part of the defendant, the car caught fire and was injured beyond repair. The plaintiff claimed against the defendant both in contract and in tort. The extended journey was of the same nature as the original one, and the defendant did no more than was originally intended. *Atkin, J.*, took the view that nothing that was done upon that further journey made the defendant an independent tortfeasor; and, if any damage was done to the car on that journey, the defendant would only be liable if he were liable under the contract made. In *Burnard v. Haggis*⁶ the defendant, an infant, hired a horse for the purpose of going for a ride expressly stating that he did not want a horse for jumping. The defendant lent the horse to a friend, who used it for jumping, with the result that it fell and was injured. The Court held that the defendant was liable on the

1. Section 2 of the Infants Relief Act, 1874; *Coxhead v. Mullis*, (1878) 3 C.P.D. 439; *Ditcham v. Worrall*, (1880) 5 C.P.D. 410, 418.

2. *Ditcham v. Worrall*, (1880) 5 C.P.D. 410, 412; *Mawson v. Blane*, (1854) 10 Exch. 206, 210; *Northcote v. Doughty*, (1879) 4 C.P.D. 385.

3. *Bruce v. Warwick*, (1815) 6 Taunt. 118; *Lumley v. Ravenscroft*, [1895] 1 Q.B. 683; *Pearce v. Brain*, [1929] 2 K.B. 310; *Valentini v. Canali*, (1889), 24 Q.B.D. 166.

4. *Burnard v. Haggis*, (1863) 14 C.B. (N.S.) 45; *Leslie (R.) Ltd. v. Sheill*, [1914] 3 K.B. 607, 611; *Jennings v. Rundall*, (1799), 8 Term Rep. 335, 336; *Fawcett v. Smethurst*, (1914) 84 L.J. (K.B.) 473; *Ballett v. Mingay*, [1943] K.B. 28; [1943] 1 All E.R. 143.

5. *Fawcett v. Smethurst*, (1914), 84 L.J. (K.B.) 473.

6. 14 C.B. (N.S.) 45; 32 L.J. C.P. 189.

ground that the act resulting in the injury to the horse was one which was quite outside the contract, and could not be said to be an abuse of the contract.

In *Jennings v. Rundall*¹ the defendant, an infant, had hired a horse to be ridden for a short journey and took it a much longer journey, with the result that it was injured. The Court held the defendant not liable, upon the ground that the action was founded in contract, and that the plaintiff could not turn what was in substance a claim in contract to one in tort by alleging that the act complained of was "wrongfully, injuriously and maliciously" done.

An infant's fraud does not validate his contract.² The English rules of equity, however, require the infant, when he obtained an advantage by falsely representing himself to be of full age, to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud. Equity will only stop short of enforcing against him a contractual obligation entered into while he was an infant, even by means of fraud.³

An infant will be compelled in equity to restore specific property which he has obtained by fraud and which is still in his possession, but he will not be compelled to repay either money or the equivalent of specific property that he has parted with.⁴ A contract for the exchange of chattels, other than necessities, entered into by an infant is a contract "for goods supplied" within the meaning of the Infants Relief Act, 1874, Section 1, and is therefore "absolutely void." The infant, however, cannot recover the chattels unless there has been a complete failure of consideration.⁵

Contracts voidable by infants in England.—A contract by which an infant acquires an interest in a subject of a permanent nature or which imposes continuing obligations upon him, is voidable at his option. He must, however, take positive steps to repudiate it at the latest within a reasonable time after attaining his majority.⁶

Purchases or leases of land and purchases of shares are voidable by an infant at his option. They will be binding on him unless he repudiates them during his infancy or within a reasonable time after he has attained his majority.⁷ If he chooses to be inactive in the matter even after attaining majority in the matter of the repudiation of the voidable contract, his opportunity passes away. The law comes to his assistance only when he moves in the matter. The reasonableness of the time within which he must move after attaining his majority depends upon the facts and circumstances of the case in question.⁸

1. 8 Term Rep. 335.

2. *Levene v. Brougham*, 25 T.L.R. 265.

3. *Cory v. Gertcken*, (1816) 2 Madd. 40; *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607; *Nelson v. Stocker*, (1859) 4 De G. & J. 458, 464; *Clarke v. Copley*, (1789), 2 Cox. Eq. Cas. 173; *Lempriere v. Lange*, (1879) 12 Ch. D. 675.

4. *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K.B. 607.

5. *Pearce v. Brain*, [1929] 2 K.B. 310.

6. *Carter v. Silber*. *Carter v. Hasluck*, [1892] 2 Ch. 278 C.A.

7. *Davies v. Beynon-Harris*, (1931) 47 T.L.R. 424.

8. *Carter v. Silber*, [1892] 2 Ch. 278, 284; *Edwards v. Carter*, [1893] A.C. 360, 366.

A voidable contract being valid until disaffirmed, the infant is liable for the contractual obligations arising out of such voidable contract before he has repudiated it.¹ Neither can he recover, on repudiation, the payments he has made earlier under the voidable contract, except, of course, in the case where no consideration at all has moved in his favour from the other party. Thus, although an infant may rescind a voidable contract he cannot recover money paid or property delivered under it unless there has been a total failure of consideration.²

An infant as a partner in a firm is not liable for the debts incurred by the firm during his infancy. So far as he is concerned the debts are payable only from the assets of the firm. If he does not repudiate the partnership even after he has attained majority, he will be held liable for the debts of the firm incurred after his attaining majority.³

Contracts binding on infants in England.—In case of necessities the supplier can recover reasonable price for the goods supplied or services rendered. A minor is also liable for the necessities of his wife and her family inclusive of her children, where any, by her previous husband. The minor is thus required to pay a reasonable price for the necessities received by him, his wife and her children. The incidents of an executory contract cannot however be fastened on him.⁴ As to what are necessities, *see* under Section 68, *post*.

While a trading contract, though it may be for the benefit of the minor, is not enforceable against him, a contract of service or apprenticeship or the like when substantially for the benefit of the minor is binding on him. A contract of service or of apprenticeship, or a contract closely analogous thereto, is binding upon an infant, provided that in the opinion of the Court it is, when construed as a whole, substantially for his benefit.⁵

Specific relief.⁶—The Specific Relief Act, 1877, has been replaced by the Specific Relief Act, 1963, with effect from 1 March, 1964. Section 31 of the Specific Relief Act, 1963, lays down that any person against whom a

1. *Davies v. Beynon-Harris*, (1931) 47 T.L.R. 424; *North Western Railway Co. v. M^r Michael*, (1850) 5 Exch. 113, 123; *Cork & Bandon Ry. Co. v. Cazenove*, (1847) 10 Q.B. 935; 116 E.R. 355.

2. *Stienberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452; *Holmes v. Blogg*, (1818), 8 Taunt. 508.

3. *Lovell & Christmas v. Beauchamp*, [1894] A.C. 607, 611; *Goode v. Harrison*, (1821), 5 B. & Ald. 147.

4. *Walter v. Everard*, [1891] 2 Q.B. 369, 374.

5. *Doyle v. White City Stadium, Ltd.*, [1935] 1 K.B. 110, 131; *Slade v. Metrodent, Ltd.*, [1953] 2 Q.B. 112; [1953] 2 All E.R. 336; *Mercantile Union Guarantee Corp., Ltd. v. Ball*, [1937] 2 K.B. 498; [1937] 3 All E.R. 1; *Roberts v. Gray*, [1913] 1 K.B. 520, 530; *Cowern v. Nield*, [1912] 2 K.B. 419, 422; *Leng & Co., Ltd. v. Andrews*, [1909] 1 Ch. 763, 769; *Flower v. L. & N. W. Ry.*, [1894] 2 Q.B. 65; *Clements v. L. & N. W. Ry.*, [1894] 2 Q.B. 482, 493; *De Francesco v. Barnum*, (1890), 45 Ch. D. 430; *Martin v. Gale*, (1876) 4 Ch. D. 428, 431; *Whywall v. Champion*, (1738), 2 Stra. 1083.

6. *See also Specific performance of contracts and Cases of specific performance of contracts*, under Section 73, *post*.

written instrument is void or voidable and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered and cancelled. If the instrument has been registered under the Indian Registration Act, 1908, the Court shall send a copy of its decree to the officer in whose office the instrument has been so registered ; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.¹ Section 33 of the Act of 1963, like Section 41 of the Act of 1877, provides that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require. Section 41 of the Specific Relief Act, 1877, did not provide for restoration, though Section 65 of the Contract Act was comprehensive of that. So far as a minor invoked the jurisdiction of the Court under Section 39 of the Specific Relief Act, 1877, there was no difficulty for the Court in requiring him while granting the necessary relief to make any compensation to the other party which justice might require.² Difficulty arose, however, in a case where an infant had induced a person to contract with him by means of a false representation that he was of full age. Opinions differed as to whether the minor while he was the defendant in a suit for cancellation under Section 39 of the Specific Relief Act, 1877, by a person as the plaintiff could be required to make any compensation to the plaintiff while adjudging the cancellation of a given instrument. There was no difference of opinion as to the view that the minor was not estopped from pleading his infancy in avoidance of a contract which such minor had induced another person to make by means of false representation that he was of full age.³ Though Section 115 of the Evidence Act is in general terms, it is read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void. No estoppel can be pleaded against a statute. As the Contract Act declares that the contract by minor is void, the fact that he entered into a contract by making a false representation as to his age will not estop him from pleading that such a contract is void on the ground of his minority.

It was also agreed that when a contract had been induced by a false representation made by an infant as to his age, he was liable neither on the

1. Section 32, *ibid.*

2. *Dattaram v. Vinayak*, (1903) 28 Bom. 181 ; *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P.C. , *Imabandi v. Mutsaddi*, (1918) 45 Cal. 878 P.C. : 45 I.A. 73 : 47 I.C. 513 : A.I.R. 1918 P.C. ; *Limbaji Ravji v. Rahi Ravji*, 49 Bom. 576 : A.I.R. 1926 Lah. 170 ; *Abdul Majid v. Ramize Bibi*, A.I.R. 1931 Mad. 468.

3. *Khan Gul v. Lakha Singh*, (F.B.), 9 Lah. 719 : A.I.R. 1928 Lah. 609 : 111 I.C. 175 : 30 P.L.R. 60 ; *Ajudhia Prasad v. Chandan Lal*, (F.B.), A.I.R. 1937 All. 610 ; *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P. C.

contract nor in tort because tort which could sustain an action for damages must be independent of the contract, and no person could evade the law conferring immunity upon an infant by converting the contract into a tort for the purpose of charging the infant. Where an action in reality was an action *ex contractu* but disguised as an action *ex delicto*, it could be enforced.

On the question whether a minor whether as plaintiff or as defendant could be required under Section 65 of the Contract Act to refund the benefit received in terms of money when in a suit a given contract was declared void because of a party thereto having been a minor and, therefore incompetent to contract, it has been held¹ by the Judicial Committee of Her Majesty's Privy Council that Section 65 of the Contract Act, like Section 64, starts from the basis of there being an agreement or contract between competent parties and has no application to a case in which there never was, and never could have been, any contract. Following this view of the Judicial Committee it has been held in *Ajudhia Prasad v. Chandan Lal*,² a full bench decision, and in many other cases, that where one of the parties is a minor and is thus incapable of contracting so that there never is and never can be a contract, Section 65 of the Contract Act can have no application to such a case as the Section starts from the basis of there being an agreement of contract between competent parties. In such a case, therefore, there would be no question of ordering him to restore the advantage which he has received or to make compensation for what he has received.

Where a contract of transfer of property is void, and such property can be traced, the property belongs to the promisee and can be restored. There is every equity in his favour for restoring the property to him. But where the property is not traceable, and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void. To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor against him under the cloak of equitable doctrine. Where money has been borrowed by two minors under a mortgage-deed at a time when they were minors, under a fraudulent concealment of the fact that the executants were minors, the mortgagee in a suit brought against them cannot get a decree for the principal money under Section 65 of the Contract Act nor under any other equitable principle, and the mortgagee cannot also get a decree for sale of the mortgaged property.

The above view of Sulaiman, C.J., as held in *Ajudhia Prasad v. Chandan Lal* is in direct conflict with that of Shadi Lal, C.J. as expressed in *Khan Gul v.*

1. *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539, 548 P. C.

2. A.I.R. 1937 All. 610; *Limbaji Ravji v. Rahi Ravji*, 49 Bom. 576.

Lakha Singh.¹ Shadi Lal, C.J., held that a party who when a minor entered into a contract by means of a false representation as to his age, cannot whether he be defendant or plaintiff, in a subsequent litigation while refusing to perform the contract, claim to retain the benefit he may have derived therefrom. His lordship while remembering that the language of Sections 39 and 41 of the Specific Relief Act, 1877, no doubt showed that the jurisdiction conferred thereby was to be exercised when the minor himself invoked the aid of the Court, was pleased to observe that the doctrine of restitution was not confined to the cases covered by Sections 39 and 41 of the Specific Relief Act, 1877. He also felt that though the Court ordinarily imposed terms upon an infant guilty of fraud if he sought its aid as a plaintiff, and declined to exercise its equitable jurisdiction, if he happened to be defendant, there was no warrant either in principle or in equity for the general rule that relief should never be granted in a case where the infant happened to be a defendant. The exact form which the relief should take must depend, his lordship continued, upon the peculiar circumstances of each case, though the contract or any stipulation therein should never be enforced. The remedy by way of restitution may sometimes involve the payment of a sum of money equal to that borrowed under the void contract. The grant of such relief would not be, according to his lordship, an enforcement of the contract, but a restitution of the state of affairs as it existed before the formation of the contract.

While thus seeking to introduce a new rule of equity against the minor defendant Shadi Lal, C.J., observed :

"It must be remembered that while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessities is not affected by the Infants Relief Act, 1874, and can be validly entered into by an infant. There should, therefore, be greater scope in India than in England for the application of the equitable doctrine of restitution."

With due respect for the learned Chief Justice Shadi Lal, it might be submitted that the very reasoning he has advanced against a fraudulent minor can be pleaded in favour of the minor. 'Infans', in Latin, means one who cannot speak. It will be recalled that an infant in England is one who has not completed the age of 21, whereas in India a man attains his majority when he has been only 18 years old. If prudence be the increasing function of experience, there is no reason why a man below 18 in India should be given a lesser amount of protection than a person below 21 in England. It has been rightly pointed out by Sulaiman, C.J., that there is no necessity of inventing a doctrine of equity against the accepted rules of equity, justice and good conscience. Unfortunately, however, Setalvad Law Commission followed in the foot-steps of the late Sir Shadi Lal instead of treading on the straight path of equitable, though rigorous, rules. Section 33 of the Specific Relief

Act, 1963, consequentially, spares no minors and lays down, *inter alia*, that where the agreement sought to be enforced against the defendant in the suit is void by reason of his not having been competent to contract under Section 11 of the Indian Contract Act, 1872, the Court may, for the cancellation of an instrument, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

It will be submitted, therefore, that in view of the conflict between the views of earlier eminent judges referred to above, the overriding authority of the Judicial Committee of Her Majesty's Privy Council should have been allowed to prevail. Had any of the provisions of the Indian Specific Relief Act, 1877, been in favour of the views held by Shadi Lal, C.J., the matter would be different. In the absence of any statutory provisions or any accepted rule of equity, justice and good conscience supporting the sentiments of Shadi Lal, C.J., it can be safely submitted that the protection a minor had hitherto enjoyed in India should not have been withdrawn without a sufficient justification for such withdrawal. As to the criticism of Setalvad Law Commission on this point *see* below.

Fifth Indian Law Commission.—The Commission while accepting the above view of Shadi Lal, C.J., observed:¹

“It appears to us incongruous that while Sections 38 and 41 of the Specific Relief Act, 1877, apply to cases of minors, the principles underlying those Sections should not be applicable to cases under the Contract Act. We feel that the Judicial Committee had not correctly interpreted Section 65 and we are of the opinion that an agreement is ‘void’ or ‘is discovered to be void’ even though the invalidity arises by reason of the incompetency of a party to a contract. We recommend that an Explanation be added to Section 65 to indicate that that Section should be applicable where a minor enters into an agreement on the false representation that he is a major.”

It will be submitted that it does not appear that Section 38 of the Specific Relief Act, 1877, applied to agreements entered into by or with a minor. An agreement entered into by or with a minor is not enforceable and therefore, not a contract at all. It may be submitted, therefore, that Section 38 of the Specific Relief Act, 1877, was not relevant so far as a void agreement by a fraudulent minor is concerned. Sections 39, 40 and 41 of the Specific Relief Act, 1877, moreover, were there to do justice to a defendant while the fraudulent minor invoked the jurisdiction of the Court as a plaintiff. There is no reason why a categorical provision should be made under Section 65 of the Contract Act conferring a greater amount of protection on the party who may be tempted to exploit the frailties of an immature youth. Almost in every contract where a minor is a party an assertion will be found reciting that the minor executant has attained majority at the time of executing the

1. Thirteenth Report (Contract Act, 1872), p. 20, para. 37.

contract. The express or implied contracts in England for the payment for necessities for the minor or his family, including the family of his wife, which, again, may include his step-children, are provided for in India under Section 68 of the Contract Act. The connotation of the word 'necessaries', again, varies with the status and needs of the minor concerned. There should, therefore, be no apprehension for all legitimate transactions. For the sale, mortgage, charge, transfer, exchange, gift, or lease of immovable property of a minor, the Hindu Minority and Guardianship Act, 1956, provides for special protective provisions in favour of the minor. Under the Guardians and Wards Act, 1890, too, an amount of protection has been provided for a minor. What is a reasonable protective measure for the minor should by all means be taken as a reasonable measure also for his transferee. Where, therefore, a person is interested in a transaction involving charge, transfer, sale, mortgage, exchange, gift, or lease of an immovable property of a minor it will be expedient that such person should persuade the minor's competent guardian to take the necessary permission of the Court in order to ensure a valid and enforceable transaction. Transferees will beware where there has been no competent guardian for the minor.

It will be submitted, therefore, that Legislature should hesitate to give a statutory recognition to the supposed rule of equity as proposed by the Law Commission to be inserted under Section 65 of the Contract Act.

It may, however, be argued in favour of the proposal made by the Law Commission that a precocious minor who by falsely representing himself to be of full age has induced an innocent person to enter into an agreement with him should be required, even as a defendant, to disgorge the benefit or advantage, whether pecuniary or otherwise, he has received from such innocent person. As against this, it may be claimed that law does not distinguish between a minor of tender years and a minor nearing his majority, and as such the question of precocity will not be a relevant factor. Where the *pros* and *cons* of a given hypothesis tend to balance each other, justice has to be done according to law, that is, according to some technical rule however hard it may appear in a particular case. While being unduly harsh against an innocent major in a given case the law may claim that it seeks to some extent to save the minor and his estate even against his own self.

It will be noted however that in spite of all these reasons to the contrary, the Specific Relief Act, 1963, by its Section 33(2) (b) compels the minor defendant to restore the benefit he had received from the plaintiff in a suit by the plaintiff for the cancellation of an instrument. This is so whether the benefit in question benefits him or his estate. To sum up, it will be submitted that Section 65 of the Indian Contract Act, 1872, should be left intact along with the judicious pieces of advice of Her Majesty's Privy Council in so far as they have not been already ignored by the Specific Relief Act, 1963.

Other disqualifications.—A person who is disqualified from contracting by any law to which he is subject cannot enter into an enforceable agreement. Any contract by or with him is void, that is, unenforceable in law.

If in spite of the personal incompetency a person enters into a contract, it will be a nullity and unenforceable at law. No question of its ratification arises.¹ An adjudged insolvent cannot contract.²

A Buddhist monk is not incompetent to make a contract of purchase or sale of property.³

Advocates, pleaders, mukhtars, and revenue agents could make contracts for fees for their services, subject to the rules of the Courts where they practised.⁴ In England, a barrister's fee for services in litigation is a gratuity or honorarium. No stamped receipt can be claimed for its payment. When, however, a receipt is given, it is dutiable.⁵ Legal practitioners in India, whether advocates, pleaders, mukhtars, or revenue agents could enter into an agreement with their clients in respect of their fees for professional services and could also sue for such fees. *Under the Indian law, the Indian barristers for the High Courts, and Queen's Counsel when enrolled as advocates in India in the High Courts of the States or the Supreme Court were cured of their disability in the matter of realisation of their fees.* It should be remembered that barristers *qua* barristers are not allowed to practise in Indian Courts. When a barrister fulfils the necessary conditions he is allowed to be enrolled as an advocate, and his seniority is determined according to the position in the roll on which his name is borne as an advocate. A barrister in India has no status *qua* barrister. The Advocates Act, 1961, now governs the legal practitioners in India. Their capacity to contract for fees remains as before.

Women in India do not suffer as such from any disability in the matter of contract. They will be bound by their contracts as much as men. By marriage they do not merge in their husbands for the purpose of the law of contract. While contracting, unless wives act as the agents of their husbands expressly, impliedly or constructively, they do not bind their husbands or their estates for the transactions. Only the *stridhan* or personal or separate property of the women contracting will be liable for their debts.⁶

For the supply of necessities in the form of service or goods for the maintenance of wives and children the law imposes obligations on the husband and father.⁷ This is so even in the case of a deserted wife and children and in spite of a warning by the husband and father to the contrary. For details see under Section 68, *post*. For married women see also below.

The Married Women's Property Act, 1874.—In India the capacity of a woman to contract is not affected by her marriage either under the Hindu or the Mahomedan law. There is no disability attached to a female, married

1. *Jethalal v. Laxmanwala*, A.I.R. 1953 Sau. 177.

2. *Rama Raju v. Official Receiver, Guntur*, A.I.R. 1964 Andhra 299.

3. *U Pyinnya v. Maung Law* (F.B.), 121 I.C. 705.

4. *Nihalchand v. Dilwar Khan*, (F.B.), 55 All. 570; A.I.R. 1933 All. 417; 143 I.C. 727.

5. *Midland Bank v. Commissioners of Inland Revenue*, [1927] 2 K.B. 465.

6. *Nathubhai v. Javher*, (1876) 1 Bom. 121; *Govindji v. Lakmidas* (1879) 4 Bom. 318; *Narotam v. Nanka* (1882) 6 Bom. 473.

7. *Pusi v. Mahadeo Prasad*, (1880) 3 All. 122, 124.

or unmarried, to preclude her from entering into a contract on the ground of her sex or coverture.¹

The Married Women's Property Act, 1874, extends to the whole of India except the State of Jammu and Kashmir. The Act does not apply to any married woman who at the time of her marriage professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions.²

If a married woman possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered if such suit had she been unmarried at the date of the contract and continued unmarried at the expiration of the period.³

Married women's earnings are their separate property.⁴ Under the Indian Succession Act, 1865, no person by marriage acquired any interest in the property of the person whom he or she married, nor became incapable of doing any act in respect of his or her own property, which he or she could have done, if unmarried.⁵ Section 20 of the Indian Succession Act, 1925, re-enacts the same principle. It lays down that no person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This Section of the Indian Succession Act, 1925, does not apply to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion. A married woman may maintain a suit in her own name for the recovery of property of any description which is her separate property. She may also be sued in respect of the said property. She may have the same remedies, civil and criminal, against all persons for the protection and security of such property, as if she were unmarried. She is also liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried.⁶

United Nations.—The United Nations possesses juridical personality having capacity to contract, to require and dispose of immovable and movable property and to institute legal proceedings.⁷

The United Nations is also enabled to make provisions for appropriate

1. *Kanhayalal v. Indrachandji*, A.I.R. 1947 Nagpur 84.

2. Section 2 of the *Married Women's Property Act, 1874*.

3. Section 8 of *Married Women's Property Act, 1874*.

4. Section 4, *ibid.*

5. Section 4 of the *Indian Succession Act, 1865*.

6. Section 7 of the *Married Women's Property Act, 1874*.

7. Article I, Section 1, of the *Convention on the Privileges and Immunities*, adopted by the General Assembly of the United Nations on the 13th day of February, 1946; Sections 2 and 3 of the *United Nations (Privileges and Immunities) Act, 1947*.

modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.¹

The United Nations, though not a sovereign body, has thus been given in India a legal status and an amount of immunity from the jurisdiction of the municipal Courts here.

For England, *see* the International Organizations (Immunities and Privileges) Act, 1950.

Other international bodies.—For the status of the International Finance Corporation *see* the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (Act 42 of 1958), Schedule, Article VI, Section 2. Under Section 2 of Article VI of the Schedule to the said Act 42 of 1958, the International Finance Corporation possesses full juridical personality, and, in particular, the capacity (i) to contract; (ii) to acquire and dispose of immovable and movable property; and (iii) to institute legal proceedings. As to the position of the Corporation with regard to judicial process, *see* Section 3 of the said Article VI. As to the immunities and privileges of officers and employees of the Corporation, *see* Section 8 of the said Article VI.

Foreign sovereigns and sovereign States.²—A sovereign independent State will not exercise any jurisdiction over the person or the property of any other sovereign State. Sovereign and diplomatic officers despite their presence in England are immune from the jurisdiction of the English Courts. The Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. They will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control³. Where the sovereign State is the admitted owner of the subject-matter of the suit or even where though not owner it is in *de facto* possession of the subject-matter through its own appointed agent, the doctrine of immunity will apply.⁴ The same immunity will apply even where the sovereign though neither owner nor in *de facto* possession is in control of the subject-matter.⁵ The immunity is unrestricted in respect of property to which a sovereign State has an immediate right of possession, as for example, where goods are in the *de facto* possession of its

1. Article VIII, Section 29, of the Convention on the Privileges and Immunities, adopted by the General Assembly of the United Nations on the 13th day of February, 1946.

2. *See* G.C. Cheshire : *Private International Law*, 5th edn., 1957, 88-126; *ibid.*, 6th ed., 1961, 87-127.

3. *The Cristina*, [1938] A.C. 485; *The Arantzazu Mendi*, [1939] A.C. 256; *The Parlement Belge*, (1880), L.R. 5 P.D. 197; *The Jupiter*, [1924] P. 236, 238; *The Broadmayne*, [1916] P. 64, 73-74.

4. *The Gagara*, [1919] P. 95; *The Cristina*, [1938] A.C. 485.

5. *The Broadmayne*, [1916] P. 64; *The Arantzazu Mendi*, [1939] A.C. 256.

bailee; or in respect of a debt, the title to which is vested in its servant.¹ The immunity is unlimited in the case of sovereign personally. Even where a sovereign enters into a contract under the guise of an ordinary private person, no action can be entertained against him if he chooses to object to the jurisdiction.²

Where a debt is due at law to a sovereign government, the proceedings will be stayed since to continue them would be to interfere with the property of the government. The government of a sovereign state are entitled to immunity from proceedings to investigate the equitable title to the debt.³

A foreign sovereign by bringing an action in the English Courts does not waive his immunity against counterclaims which were unrelated to and independent of the subject matter of the action.⁴

Where a foreign sovereign State claims, in proceedings to which it is not a party, immunity from the Court's jurisdiction for its alleged interests in property which is the subject of the proceedings, the bare assertion of a claim of title to the property is not enough to entitle the foreign sovereign State to that immunity; but once the Court is satisfied that there are conflicting rights which have to be decided in relation to the claim of the foreign sovereign State and that the State's claim is not for rights which are illusory the State is entitled to immunity from the Court's jurisdiction.⁵

The doctrine of immunity of a sovereign's property raises a problem when a sovereign seeks to intervene in action by two third parties and to obtain a stay of proceedings on the ground that it possesses an interest to the property to which the action relates. As to this problem it has been held that the bare assertion of a claim by a sovereign will not be deemed sufficient for a stay of proceedings in an action by two third parties. Where the sovereign is not a party to the action, his proprietary or possessory interest in the subject-matter has either to be admitted or proved before the doctrine of immunity from the Court's jurisdiction can be invoked. Where the property is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent but is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the plea that the sovereign's immunity is not being recognised in a municipal Court of a foreign land becomes meaningless before the question of title be first answered in favour of the sovereign.⁶ Where the sovereign's claim of title is manifestly defective, his claim to immunity will be unfounded. The

1. *Hyderabad (Nizam) v. Jung*, [1956] 3 W.L.R. 667; [1956] 3 All E.R. 311; *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*, [1952] A.C. 582.

2. *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149.

3. *Nizam of Hyderabad v. Jung & ors.*, [1956] 3 All E.R. 311.

4. *High Commissioner for India v. Ghosh* [1959] 3 W.L.R. 811 C.A.; see (English) *Annual Practice* (1959), R.S.C. Ord. 16, r. 1; Ord. 21, r. 17.

5. *Juan Ysmael & Co. v. Government of Indonesia* (a case from Hong Kong), [1954] 3 All E.R. 236 P.C.

6. *Haile Selassie v. Cable & Wireless Ltd.*, [1938] Ch. 839, 844, 845.

foreign sovereign though not bound as a condition of obtaining immunity to prove its title to the interest claimed must produce evidence to satisfy the Court that its claim is not merely illusory, nor founded on a title manifestly defective. The Court must be satisfied that conflicting rights have to be decided in relation to the foreign sovereign's claim. When the Court reaches that point it must decline to decide the rights and must stay the action, but it will not stay the action before that point is reached.¹ Thus, where the principle of immunity is invoked in cases in which the foreign sovereign is not itself sued, but which concern property in which the foreign sovereign claims some proprietary or possessory interest, then, in the absence of a proved or admitted right of property in the foreign sovereign, possession or control by it of the thing in suit is a condition essential to the application of the principle of immunity.²

Proceedings brought against a foreign sovereign will be stayed if it remains passive or if it moves to set the writ aside, but it is always to the sovereign to waive its immunity and to submit to the jurisdiction of foreign municipal Court. Waiver is effective only where the foreign sovereign is bound by treaty to submit to the particular proceedings that have been brought against it. The fact that a foreign sovereign is a party to a contract which provides that all disputes shall be referred to arbitration or to the municipal Courts of a foreign State does not suffice as an effective submission to their jurisdiction.³ If the waiver is by appearing as defendant and arguing on the merits, it will extend only to the case disclosed in the writ or pleadings and the plaintiff will not subsequently be able to widen the scope of his action by amendment of the pleadings or otherwise, unless there is a new waiver to cover the amendment. If it is a waiver by appearing as plaintiff, the Court will have jurisdiction to decide on matters put before it by the defendant only to the extent that justice requires that the Court should consider them in order that it can pronounce on the plaintiff's claim.⁴

Ambassadors and other diplomatic officers and the English law.⁵—

The representatives of a sovereign State are given, under the English common law, the same immunity as the sovereign power they represent. The English Diplomatic Privileges Act, 1708, provides that an ambassador accredited to England cannot be sued in England against his will.⁶ He is exempt from civil and criminal liability. The immunity extends to his wife and children

1. *Juan Ysmael & Co. Inc. v. Indonesian Government*, [1955] A.C. 72, 89-90.

2. *The Cristina*, [1938] A.C. 485, 490; *Dollfus Mieg et Compagnie v. Bank of England*, [1949] Ch. 369, 382; as to the other aspects of sovereign immunity, see Cheshire: *Private International Law*, 5th edn., 1957, chap. IV.

3. *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; *Kahan v. Pakistan Federation*, [1951] 2 K.B. 1003.

4. Sir Eric Beckett, *Annuaire l' Institut de Droit International* (1952), vol. i, 79, *cited*, Cheshire: *Private International Law*, 5th edn., 1957, 100; *ibid.*, 6th ed., 1961, 102.

5. See Cheshire, 5th edn., 1957, 101-103; *ibid.*, 6th ed., 1961, 103-06.

6. *The Parlement Belge*, (1880), 5 P.D. 197, 202; *Dickinson v. Del Solar*, [1930] 1 K.B. 376; *The Amazone*, [1940] P. 40.

when living with him and to his counsellors, secretaries, clerks and domestic servants.¹ A consul is not a diplomatic envoy and is immune from the jurisdiction of a foreign municipal court only to a limited extent. A consul is not liable either to civil or criminal proceedings for acts performed in his official capacity and falling within the functions of a consular officer. He is however liable in respect of his private transactions.

"The immunity is absolute in the case of an ambassador or public minister and his family and remains effective even though he engages in private trading, but it does not extend to the servants of the Embassy so far as they engage in trading transactions."²

"A diplomatic officer may waive his privilege, but he can do this effectively only if he has full knowledge of his rights, and provided that he first obtains the consent of his sovereign or of his official superior. His immunity is the immunity of the ambassador and ultimately that of the Government which he represents, so that if it is waived by the ambassador or by the Government, it ceases."³

It is usual for an ambassador to furnish the Foreign Office with a list of persons engaged in the Embassy, and the acceptance by the Foreign Office of the list gives the persons concerned the required status.⁴

"The immunity of an ambassador is not confined merely to the period during which he is accredited to the English sovereign, but continues for such period after presentation of his letters of recall as is reasonably necessary for the winding up of his official business and his private affairs. The fact that his successor enters upon his official duties before the termination of this reasonable period does not affect the immunity.⁵ But if he is dismissed and his immunity waived by his sovereign, no extension of the immunity is allowed."⁶ The immunity accorded to an envoy in respect of acts done in his official capacity (as opposed to that accorded to him in respect of acts done in his private capacity) does not cease on his ceasing to be an envoy, and article 12 of the Order in Council confers on the envoy the like immunity.⁷

The general principles that confer diplomatic immunity against the initia-

1. *Engelke v. Musmann*, [1928] A.C. 433, 450 H.L.(E.)

2. Cheshire, 5th edn., 1957, 102; *ibid.*, 6th ed., 1961, 103. *Taylor v. Best* (1854), 14 C.B. 487, 519; *The Porio Alexander*, [1920] P. 30, 37; *Heathfield v. Chilton* (1767), 4 Burr. 2016; *Viveash v. Becker* (1814), 3 M. & S. 284; *Musmann v. Engelke*, [1928] 1 K.B. 90, 103 C.A.

3. *Rex v. A.B.*, [1941] 1 K.B. 454.

4. Cheshire, 5th edn., 102; *ibid.*, 6th ed., 1961, 104; *Taylor v. Best* (1854), 14 C.B. 487; *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *In re Suarez*, [1918] 1 Ch. 176.

5. *Magdalena Steam Navigation Company v. Martin* (1859) 2 E. & E. 94; *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352.

6. *Rex v. A.B.*, [1941] 1 K.B. 454; see Cheshire: *Private International Law*, 5th edn., 1957, 103; *ibid.*, 6th ed., 1961, 105.

7. *Zoernsch v. Waldock*, [1964] 2 All E.R. 256 C.A.; *Rahimtoola v. H. E. H. The Nizam of Hyderabad* [1957] 3 All E.R. 441; [1958] A.C. 379 H.L. applied; see also 7 *Halsbury's Laws*, (3rd edn.) 270, para. 574, and the cases therein referred to.

tion of legal proceedings confer an equal immunity against the continuation of pre-existing and properly constituted proceedings.¹

For England *see also* the Diplomatic Immunities Restriction Act, 1955. For immunity of the chief representatives of India and other Commonwealth countries in the United Kingdom and the members of their official staff, etc., from suit and legal process and the waiver thereof *see* the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 18).²

Alien enemy under the English law.—Alien enemies cannot sue, though they can be sued. When sued, an alien enemy can plead a set off in diminution of the plaintiff's claim, can take all the procedural steps and can also appeal to a higher court.³ An alien enemy cannot initiate an action or continue one that had been initiated before hostilities. His right of action is generally abrogated, but sometimes merely suspended.⁴ A person of hostile nationality who is within the Queen's peace, as for example, when he is resident in England under a cartel or by permission of the Crown is temporarily free from his enemy character and may invoke the jurisdiction of English Courts.⁵

Whether a person is an alien enemy does not depend upon his nationality but upon where he resides or carries on business. A subject of Her Majesty or a neutral who is voluntarily resident or who is carrying on business in enemy territory or in territory under the effective control of the enemy is treated as an alien enemy and is in the eye of the law in the same position as a citizen of hostile nationality resident in hostile territory.⁶ For the purposes of the English Trading with the Enemy Act, 1939, which penalises persons having intercourse with the enemy, *de facto* residence, though not voluntary, is sufficient.⁷

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

1. *Ghosh v. D'Rozario*, [1962] 3 W.L.R. 405 C.A.

2. *See also Regina v. Madan*, [1961] 2 W.L.R. 231 C.C.A.; *Rex v. A.B.*, [1941] 1 K.B. 454; *sub nom. Rex v. Kent*, 57 T.L.R. 307 C.C.A.

3. *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; *Porter v. Freudenberg*, [1915] 1 K.B. 857.

4. *In re Stahlwerk Becker Aktiengesellschaft's Patent*, [1917] 2 Ch. 272; *see Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219.

5. *The Hoop* (1799) 1 C. Rob. 195, 201; *Princess Thurn & Taxis v. Moffit*, [1915] 1 Ch. 58; *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

6. *Porter v. Freudenberg*, [1915] 1 K.B. 857, 869; *Sovracht (v.o.) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)*, [1943] A.C. 203.

7. *Vamvakas v. Custodian of Enemy Property*, [1952] 2 Q.B. 183.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Unsound mind in the Indian law.—A person of unsound mind is not competent to contract. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.¹ A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.² Thus, a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals. A person who is usually of sound mind, but occasionally of unsound mind, is not considered, in the eye of the law, competent to make a contract when he is of unsound mind. Thus, a sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, is incompetent, in the eye of the law, to make a contract whilst such delirium or drunkenness lasts.

Where a party to a contract was of unsound mind at the time of entering into the contract the contract so entered is void under Sections 10 and 11 of the Indian Contract Act. This unsoundness of the mind may be caused by lunacy, drunkenness or delirium or any other sufficient and like cause. Thus a contract entered into by a person of unsound mind will be void under the Indian law though such a contract in English Law would be in a majority of cases only voidable. A contract by a person of unsound mind being void cannot be ratified by him even when he regains sanity, sobriety or equilibrium. The Indian law, like the English law, makes provision for the payment for the goods or services supplied to the person of unsound mind and the members of his family. Section 68 of the Indian Contract Act lays down that if a person incapable of entering into a contract or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

For the purposes of Section 12, the test of unsoundness of mind is whether the person is incapable of understanding the business concerned and its

1. *Ram Sunder v. Kali Narain*, 104 I.C. 527 : A.I.R. 1927 Cal. 889.

2. *Jai Narain v. Mahabir Prasad*, (1926) 2 Luck. 226 : 95 I.C. 857 : A.I.R. 1926 Oudh 470.

implications, and mere weakness of mind is not sufficient.¹ A sale-deed executed by a person who was unable of understanding business and forming a rational judgment as to its effect upon his interest at the relevant time does not confer any title on the vendee.²

The question whether a person is of unsound mind at the time of execution of a document is a question of fact; but this question does not depend merely upon the belief or disbelief of witnesses before the Court. It would depend on inference to be drawn from the evidence.³ The circumstances evidencing insanity should be considered together and not individually and their cumulative effect should be gauged.⁴

The onus of proving insanity is in the first place on the person who alleges it, the normal presumption being of sanity.⁵ When a transaction is impeached on the ground that the person who has executed the document was a man of unsound mind, the initial onus lies on the person who comes up with the case that the executant was a person of unsound mind. Normally, the presumption is of sanity. If however there is sufficient evidence to prove that the person had been adjudged under the Lunacy Act, 1912, to have been a lunatic, or if there is other sufficient evidence to show that a person had at a certain stage been of unsound mind, the burden shifts to the person who alleges sanity.⁶

A lunatic is not a person who is continuously in a state of unsoundness of mind. But once it has been established that a person is a lunatic, the burden of proof will be on the party who alleges that a document he relies on though executed by a lunatic had been executed by him during a lucid interval. The fact that the document was registered does not shift the burden of proof in regard to the factum of execution in a sound state of mind.⁷ The person who relies on the unsoundness of mind must establish that he was incapable of understanding business and forming a rational judgement as to its effect upon his interests.⁸ It is even doubtful whether it could be held that any person was by reason of unsoundness of mind incapable of entering into a contract in the absence of any medical evidence.⁹

1. *Kanhaiyalal v. Harsing*, (F.B.), (1944) Nag. 698 : A.I.R. 1944 Nag. 232.

2. *Indar Singh v. Parmeshwardhari*, A.I.R. 1957 Patna 491 ; *Amina Bibi v. Saiyid Yusuf*, 44 All. 748 : A.I.R. 1922 All 449.

3. *Chunilal v. Amarendra*, A.I.R. 1953 Assam 94 ; *Tilok Chand v. Mahandu*, 144 I.C. 741 ; A.I.R. 1933 Lah. 458 : 144 I.C. 741. *U Aung Ya v. Ma E Mai*, 137 I.C. 766 : A.I.R. 1932 Rang. 24.

4. *Ghunsham Das v. Umapershad*, A.I.R. 1919 P.C. 6 : 15 N.L.R. 68.

5. *Mohanlal v. Vinayak*, (1942) Nag. 236 : A.I.R. 1941 Nag. 251 : 196 I.C. 660.

6. *Bahadur v. Bir Bahadur*, A.I.R. 1956 Cal. 213.

7. *Subrahmanya v. Lakshminarasamma*, A.I.R. 1958 Andhra 22 ; *Mohanlal Madan Gopal v. Vinayak*, (1942) Nag. 236 : A.I.R. 1941 Nagpur 251 ; *Seshamma v. Padmanabha*, 40 Mad. 660 : A.I.R. 1917 Mad. 265.

8. *Indar Singh v. Parmeshwardhari*, A.I.R. 1957 Patna 491 ; *U Aung Ya v. Ma E Mai*, A.I.R. 1932 Rang. 24 ; *Kanhaiyalal v. Harsing*, (F.B.), (1944) Nag. 698 : A.I.R. 1944 Nag. 232 ; *Mahomed Yakub v. Abdul Quaddus*, A.I.R. 1923 Pat. 187 : 68 I.C. 372.

9. *Chunilal v. Amarendra*, A.I.R. 1953 Assam 94.

A deed executed by a certified lunatic during a lucid interval is void.¹ When a person has been found lunatic by inquisition, in England, so long as the inquisition has not been superseded but continues in force, he cannot even during a lucid interval execute a valid deed dealing with or disposing of his property. The Court will not recognise such a deed even by directing proceedings to be taken to by the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed but will treat the deed as entirely null and void.²

The mere loss of vigour and mental infirmity due to old age do not amount to unsoundness of mind within the meaning of Section 12 of the Contract Act. Unless such loss of vigour and mental infirmity disable a man of old age at the time of a particular transaction from understanding what he is doing, the transaction will not be void.³ Similarly, mere hard drinking⁴ or weakness of mind⁵ will not render a contract void. Neither has utter mental darkness or congenital idiocy to be proved.⁶ It all depends on whether at the time of making a particular contract the person concerned understood what he was doing. All the circumstance of the case including the advice he sought and received will be considered relevant.⁷ When a person's mind reaches a state of imbecility, his signature to a document would not of itself give the document a conclusive force.⁸

The *de facto* manager of the estate of an adult Hindu who is incapable of contracting because of unsoundness of mind cannot alienate his property even in case of necessity.⁹ A lunatic is not disqualified as such to take immovable property under an executed contract and thus a mortgage executed in his favour is enforceable by him.¹⁰ Questions of undue influence and those of unsoundness of mind are distinct issues.¹¹ The fact that the Sub-Registrar accepted a document from the executant and duly registered it is *prima facie* proof that the executant was not in an intoxicating condition when he presented it for registration.¹²

The English law.—A contract made during a lucid interval by a party who is of unsound mind is, in England, binding on him though the incapa-

1. *Subbunnaicker v. Solaiappa*, (1934) 147 I.C. 479.
2. *Re Walker*, [1905] 1 Ch. 160.
3. *Ramsundar v. Kalinarain*, 104 I.C. 527 : A.I.R. 1927 Cal. 889.
4. *Jainarain v. Mahabir Prasad*, (1926) 2 Luck. 226 : 95 I.C. 857 : A.I.R. 1926 Oudh 470.
5. *Mahomed Yakub v. Abdul Quaddus*, 68 I.C. 372 : A.I.R. 1923 Pat. 187.
6. *Tuirnamagal v. Ramaswami*, 1 M.H.C. 124 ; *Ram Sahye v. Laljee*, 8 Cal. 149.
7. *Rajkumar v. Ramsundar*, 136 I.C. 102 ; *Amina Bibi v. Yusuf*, 70 I.C. 968.
8. *Keolapati v. Amar Krishna Narain Singh*, 183 I.C. 662 P.C.
9. *Narayan v. Ramchandra*, (F.B.), A.I.R. 1957 Bom. 146 ; *Kanhaiyalal v. Harsing*, (F.B.), (1944) Nag. 698 : A.I.R. 1944 Nag. 232.
10. *Sheoratsensingh v. Kalicharan*, 79 I.C. 955.
11. *Sayad Muhammad v. Fatteh Muhammad*, 22 Cal. 324 : (1894) 22 I.A. 4, 10 ; *Durgabakhsh v. Mirza Muhammad Ali*, (1904) 31 I.A. 235.
12. *Kotumal v. Dur Mahomed*, A.I.R. 1931 Sind 78 ; *Gangamoyi v. Troilukhya*, (1905) 33 Cal. 537 : 33 I.A. 60 P.C.

city was known to the other party.¹ A contract made even though during a lucid interval by a person who has been found of unsound mind by inquisition is absolutely void.² Where a person is of unsound mind, but has not been so found by inquisition, a contract with him is *prima facie* valid. This rule of *prima facie* validity is subject to the further rule that when the person of unsound mind when entering into the contract was so insane that he was not capable of understanding the nature of his act, and the other party to the contract was ware of this incapability on the part of the insane person, the contract is voidable by the party who was of unsound mind.³ Where, however, necessities are sold and delivered to a person or to the wife and children of a person who by reason of mental incapacity is incompetent to contract he has to pay a reasonable price therefor. The law prescribes that the said price will be realised from his property.⁴

Similarly, when a contract is made by or with a party who is in such a state of drunkenness as not to be capable of knowing what he was doing, and this state was known to the other party to the contract, then the contract made in such circumstances is voidable by the party who was drunken. This voidable contract may however be ratified or affirmed by such party after he has regained sobriety. Where, however, necessities are sold or delivered to a person in a state of drunkenness or to the wife or children of such person, the price therefor is recoverable.⁵

13. Two or more persons are said to consent when they "Consent" defined. agree upon the same thing in the same sense.

Consent.—Two or more persons are said to consent when they agree upon the same thing in the same sense. Without consent in this sense there will be no consensus of two minds, and therefore no contract. As to effect of mistake, see Sections 20-22, *post*.

Consent implies an act of reason accompanied with deliberations, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things—a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprisc, or undue influence, it is to be treated as delusion, and not as a deliberate and free act of the mind.⁶

Consent obviously implies understanding on the part of the party giving the consent. In the case of a pardanashin lady it is thus necessary to satisfy

1. *Selby v. Jackson*, (1844) 6 Beav. 192.

2. *Re Walker*, [1905] 1 Ch. 160.

3. *Molton v. Camroux*, (1848), 2 Exch. 487, *affd.* (1849), 4 Exch. 17; *Imperial Loan Co. v. Stone*, [1892] 1 Q.B. 599.

4. Section 2 of the English Sale of Goods Act, 1893; *Re Rhodes*, (1890) 44 Ch. D. 94; *Read v. Legard*, (1851) 6 Exch. 636.

5. The English Sale of Goods Act, 1893, Section 2; *Gore v. Gibson*, (1845) 13 M. & W. 623; *Matthews v. Baxter*, (1873), L.R. 8 Exch. 132; *Molton v. Camroux*, (1848), 2 Exch. 487.

6. Wharton: *Law Lexicon*, 14th edn. 1953, 235.

the Court that she executed the document with full understanding of execution and of the nature and effect of the transaction, and even in cases where she had independent advice, the Court will scrutinise the transaction very closely to see that it is a fair one. Where the document is not in her mother tongue, the law further requires that she understood and not merely heard what was read.¹ Similarly, unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, the Court ought not to be astute to discover indications of such an indication.²

The rule of estoppel enunciated in Section 116 of the Evidence Act, 1872, is subject to the general position that it will not avail against any statute. Therefore, if the estoppel pleaded can be proved to contravene the law, *e. g.*, the law of contracts, the plea of estoppel will not prevail. It will, therefore, be open to the tenant, for example, to avoid the contract of tenancy if it is subject to any of the infirmities enumerated in Sections 13 to 20 of the Contract Act.³ Similarly, when an instrument did not represent the real agreement between the parties, question of estoppel does not arise.⁴ In the absence of sufficient reason to the contrary, the Court will presume that a party agrees to be bound by the terms of a document as they read or as they are interpreted by a Court of law.⁵

For the formation of a contract consent that is voluntary is essential. As to what is free consent see *infra*. Where an agreement has been formed without the basis of free consent, it will be voidable at the option of the party whose consent was not freely given. See Section 19, below.

14. Consent is said to be free when it is not caused by—

- “Free consent”
defined.
- (1) coercion, as defined in Section 15, or
 - (2) undue influence, as defined in Section 16, or
 - (3) fraud, as defined in Section 17, or
 - (4) misrepresentation as defined in Section 18, or
 - (5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been

1. *Hussaina Bai v. Zohra Bai*, A.I.R. 1960 M.P. 60 (*Nathusa v. Mohammad*, (1941) Nag. 418 : A.I.R. 1939 Nag. 159, relied on.); *Subhas Chandra v. Subasini*, A.I.R. 1951 Assam 46; *Pragash v. Dulhin*, A.I.R. 1951 Patna 457.

2. *Surinder v. Ripudaman*, A.I.R. 1955 N.U.C. (Punjab) 3429.

3. *Khalil v. Aziz*, A.I.R. 1960 J. & K. 132.

4. *Tyagaraja v. Vedathanni*, 59 Mad. 446 P.C. : (1935) 63 I.A. 126 : 160 I.C. 384 : A.I.R. 1936 P.C. 70; *Sarat Chandra v. Kanai Lal*, 26 C.W.N. 479 : A.I.R. 1921 Cal. 786; *Oriental Bank Corporation v. Fleming*, (1879) 3 Bom. 242; *Banku Behari v. Krishto*, (1903) 30 Cal. 433.

5. *Sunithibala v. Manindra*, 52 C.L.J. 435; 127 I.C. 739 : A.I.R. 1930 P.C. 217; *Santhappa v. Santhiraja*, (1938) 1 M.L.J. 676 : 178 I.C. 563 : A.I.R. 1938 Mad. 426; *Wahidunnessa v. Surgadass*, (1879) 5 Cal. 39.

given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Free consent.—For the formation of a binding agreement free consent of the parties to the agreement is indispensable. Where the consent of either of the parties thereto has not been free or voluntary, the agreement is voidable at the option of the party whose consent was not free or voluntary. For details see Section 19, *post*.

Consent is given freely when it is not caused by coercion, as defined in Section 15, or by undue influence, as defined in Section 16, or by fraud, as defined in Section 17, or by misrepresentation, as defined in Section 18, or by mistake. Where a party to an agreement would not have given his consent to it but for the existence of some coercion, undue influence, fraud, misrepresentation or mistake as these terms are understood under the Indian Contract Act, his consent, so given, will not be in the eye of the law deemed to have been freely given. Where the consent of a party to a contract was not freely given the contract is voidable at his option. When, however, the consent is not free in view of a mistake, there are some special provisions regarding the effect of mistake on the agreement made. For details see Sections 20-22, *post*.

15. “Coercion” is the committing or threatening to commit, any act forbidden by the Indian Penal Code (“Coercion” defined. (XLV of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code (XLV of 1860) is or is not in force in the place where the coercion is employed.

Illustration

A on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (XLV of 1860).

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code (XLV of 1860) was not in force at the time when or the place where the act was done.

Coercion.—Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code, 1860, or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. The reference to the Indian Penal Code, 1860, is reference to any offence as created by the said Code. It is not material that the said Code is not or was not in force in the place where the coercion is or was employed. A British ship on the high seas is regarded as a British territory. If *A* while on board such a ship causes *B* to enter into an agreement by an act amounting to

criminal intimidation under the Indian Penal Code, 1860, and then sues *B* for breach of such agreement at Calcutta, *A* will be construed as having employed coercion in the sense in which it is understood in Section 15 of the Indian Contract Act. It is not material that the Indian Penal Code was not operative at the time or place when or where the act was done.

In England, coercion is known as duress. Duress means actual violence or threats of violence calculated to produce fear of loss of life or of bodily harm. In order to constitute itself a duress, the threat must be illegal, that is, it must be a threat to commit a crime or a tort. Secondly, in England, the duress must relate to the person of the party and not to his goods.¹ In India, the definition of coercion under Section 15 of the Contract Act is much wider than that of duress under the common law of England. Where the consent of a person has been obtained to a contract by the commission of a threat to commit a crime under the Indian Penal Code or by unlawful detention or a threat of such detention of any property, not necessarily that of the person whose consent has been obtained, to the prejudice of such person or any person whatever, it will be a case of coercion under the Indian Contract Act and a contract thus caused will be voidable at the option of the party whose consent has been so obtained. If the consent of a party has been obtained by coercion, the contract will be voidable at his option even though a third party's person or property was threatened. This is no doubt a very equitable rule. The element of force involved vitiates the binding nature of the contract.² A threat to commit suicide with the intention of causing a person to enter into an agreement is an act of coercion.³ The observation in Pollock and Mulla's *Contract Act*, 8th edn., 1957, edited by M.C. Setalvad, p. 104, to the effect that, "It might be well to amend the present Section by adding after 'forbidden' such words as 'or an attempt to commit which is forbidden'" is not well-founded. In *Ammiraju v. Seshamma*⁴ a person by a threat of suicide induced his wife and son to execute a release deed in favour of his brother in respect of certain properties which they claimed as their own. Wallis, C.J., and Seshagiri Ayyar, J. rightly held that the threat of suicide amounted to coercion within Section 15 of the Indian Contract Act, and the release deed was therefore voidable. Suicide is an "act forbidden by the Indian Penal Code," and suicide by a Hindu if actually committed, will be an act not only to his own prejudice but also to the prejudice of his wife and son within Section 15 of the Contract Act. The view of the dissenting Judge, Oldfield, J., that suicide is not an act forbidden by the Indian Penal Code directly or inferentially is not

1. *Atlee v. Backhouse* (1838) 3 M. & W. 633, 650; *Skeats v. Beale* (1840), 11 Ad. & El. 983.

2. *Ammiraju v. Seshamma*, (1918) 41 Mad. 33; *Gobardhan Das v. Jai Kishen Das*, (1900) 22 All. 224; *Ranganayakamma v. Alwar Setti*, (1889) 13 Mad. 214; *Masjidi v. Mi. Ayisha*, (1882) Punj. Rec. No. 135; *Banda Ali v. Banspat Singh*, (1882) 4 All. 352 : 40 I.C. 352.

3. *Ammiraju v. Seshamma*, (1918) 41 Mad. 33.

4. (1918) 41 Mad. 33.

tenable. G. Venkataramayya, counsel for the respondent, rightly asserted that Section 15 of the Contract Act speaks of "an act forbidden by the Indian Penal Code" and not of an offence punishable under the Indian Penal Code. Suicide is an act forbidden as the attempt¹ or abetment² thereof is an offence punishable under the Indian Penal Code. In addition to the submission of the learned counsel for the respondent, G. Venkataramayya, and the observation of Wallis, C.J., and Seshagiri Ayyar, J., it may also be noted that the threatening to commit suicide includes a threat to make an attempt to commit suicide. An attempt to commit suicide is itself an offence which is punishable under Section 309 of the Indian Penal Code; and, therefore, a threat to make an attempt to commit suicide with a view to causing a person to enter into an agreement is a coercion under Section 15 of the Indian Contract Act. The observation that suicide when committed is not an offence punishable in India³ has no bearing for the purpose of Section 15 of the Indian Contract Act. When consent to an agreement is caused by coercion, the agreement is voidable at the option of the party whose consent was so caused. See Section 19, *post*.

The question of coercion is one of the fact depending upon the circumstances of each case.⁴ A threat to bring a true charge will not be an act forbidden by the Penal Code but a threat of a false charge would come within Section 15 of the Indian Contract Act.⁵

A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detention; or a threat of such detention of a property is not coercion under Section 15 of the Indian Contract Act.⁶ Detention of office books is an act of coercion.⁷

A threat not to withdraw criminal proceedings already instituted unless a bond is executed is no coercion under Section 15 of the Indian Contract Act.⁸

A transaction (to accept assessment offered) made and signed under duress, even though the duress is legal, cannot be termed a contract.⁹

16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

1. Section 309 of the Indian Penal Code.

2. Sections 305 and 306, *ibid*.

3. *Scottish Union and National Insurance Co. v. Roushan Jahan Begam* [1945] 15 Comp. Cas. (Ins.) 53, 64.

4. *Bhagwan v. Nayankunvarba*, A.I.R. 1953 Sau. 53; *Satgur v. Har Narain*, 7 Luck. 64; A.I.R. 1932 P.C. 89; *Gopal v. Jagannath*, A.I.R. 1935 Bom. 326.

5. *Mirza v. Jaikishori*, 16 I.C. 344.

6. *Bengal Stone Co. Ltd. v. Joseph Hyam*, (1918) 27 C.L.J. 78, 80-82.

7. *Muthiah Chettiar v. Karuppan Chetti*, (1927) 50 Mad. 786; 105 I.C. 5; A.I.R. 1927 Mad. 852.

8. *Rameshwar v. Upendranath*, 90 I.C. 463.

9. *Kunwarlal v. Government of Central Provinces & Berar*, A.I.R. 1944 Nag. 201.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

(a) *A* having advanced money to his son, *B*, during his minority, upon *B*'s coming of age, obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) *A*, a man enfeebled by disease or age, is induced, by *B*'s influence over him as his medical attendant, to agree to pay *B* an unreasonable sum for his professional services. *B* employs undue influence.

(c) *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) *A* applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Undue influence.—A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Where a person has exerted his influence over another and has consequently persuaded that other to enter into a contract with himself or with a third person on terms which the person influenced would not accept if he had exercised his own free judgment, then the contract in question will be deemed to have been tinged with undue influence.¹ Undue influence is thus some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage

1. *Poosathurai v. Kannappa*, (1919-20) 47 I.A. 1: A.I.R. 1929 P.C. 65.

obtained by a party at the cost of the other.¹ An undue influence is any influence, pressure, or domination in such circumstances that the person acting under that influence may be held not to have exercised his free and independent volition in regard to the act.² Section 16 of the Indian Contract Act covers all possible cases in which dominating will is possible.³

The word 'undue' when qualifying 'influence' has a legal meaning of 'wrongful' as opposed to excessive, inordinate or disproportionate. Undue influence is understood to be held when it overpowers the will without convincing the judgement. It is a grip on another's mind subjugating his will to that of the other. It is an influence which acts to the injury of a person who is swayed by it, and is exerted by exercising an ascendancy or power, which results in a person being impelled or compelled to do what he would not have done if he had been a free agent. It is said to be a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches and seductive artifices. The result is sometimes brought about by fear, coercion, importunity or other domination calculated to prevent expression of the victim's true mind. It is a constraint undermining free agency overcoming the powers of resistance bringing about a submission of an overmastering and unfair persuasion to the detriment of the other.⁴

Whether a particular transaction was vitiated on the ground of undue influence is primarily a decision on a question of fact.⁵ The petition of the person alleged to have been unduly influenced must include full particulars of the allegations which he intends to prove. General allegations are insufficient even to amount to an averment of fraud, undue influence, or coercion.⁶

Presumption of undue influence.—Under sub-section (2) of Section 16 of the Act a person is deemed to be in a position to dominate the will of another (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. The Act also lays down in sub-section (3) of Section 16 that where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be

1. *Allcard v. Skinner* (1887) 36 Ch. D. 145, 181; *Nottidge v. Prince* (1860), 2 Giff. 246; *Norton v. Relly* (1764), 2 Eden., 286; *Lyon v. Home* (1868), L.R. 6 Eq. 655; *Mutual Finance Ltd. v. Wetton & Sons*, [1937] 2 K.B. 389; [1937] 2 All E.R. 657.

2. Wharton: *Law Lexicon*, 14th ed., 1953, 1024.

3. *Narayandoss v. Bucharaj* A.I.R. 1928 Mad. 6; *Amrit Lal v. Ram Kumar (S. B.)* A.I.R. 1962 Punj. 325; *Mahboob v. Abdul*, A.I.R. 1964 Raj 250.

4. *Someshwar v. Tirbhawan* (1933-34) 61 I.A. 224; A.I.R. 1934 P.C. 130.

5. *Sattenma v. Subbi* A.I.R. 1963 Andhra 72.

6. *Ladli Parshad v. Karnal Distillery Co.*, A.I.R. 1963 S.C. 1279; *Satgur Prasad v. Har Narain* 59 I.A. 147; A.I.R. 1932 P.C. 89; *Bishundeo Narain v. Seogeni Rai* [1951] S.C.R. 548; A.I.R. 1951 S.C. 280; *Bharat Dharma Syndicate v. Harishchandra*, 64 I.A. 143; A.I.R. 1937 P.C. 146; *Raghunath v. Sarju*, A.I.R. 1924 P.C. 60; *Someshwar v. Tirbhawan*, (1933-34) 61 I.A. 224; A.I.R. 1934 P.C. 130; *Narayana v. Narasimha* A.I.R. 1965 Ker. 189.

unconscionable, the presumption will be that the person holding the dominion had exercised undue influence in the formation of the contract and the burden of proving that such contract was not induced by undue influence, statutorily, lies upon the person in a position to dominate the will of another. *A*, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.¹ This statutory provision of the Contract Act is in addition to the provisions of Section 111 of the Evidence Act. The said Section lays down:

“Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of transaction is on the father.”

A document executed under undue influence is not void but only voidable and the onus is in the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence, the person raising the plea of undue influence has to prove not only that the other party was in a position to dominate his will, but that the transaction appeared on the face of it or on the evidence adduced unconscionable.²

Presumption of undue influence is raised where the Court regards the transaction as *prima facie* unfair and the person who benefits from it is required to show that in fact it was a fair and a reasonable deal and he did not take advantage of his position or of the necessitous circumstances or inexperience of the other. The burden lies on the recipient to show that the donor had independent advice or adopted the transaction after the influence was removed or some equivalent circumstances.³

In the case of benefits or advantages obtained in certain relationships, the existence of this influence is presumed, e.g., guardian and ward, a parent over a child upon or soon after attaining age and the possession of property, a guide or instructor, medical advisers, ministers or professors of religion, managers of business,⁴ attendants upon or advisers of aged and infirm people.

1. Illustration (c) to Section 16. *Ladli Parshad v. Karnal Distillery Co.* A.I.R. 1963 S.C. 1279. *Sattemma v. Subbi*, A.I.R. 1963 Andhra 72.

2. *Kotumal v. Dur Mahomed*, A.I.R. 1931 Sind. 78.

3. *Zamet v. Hyman* [1961] 1 W.L.R. 1442 C.A.; *Ladli Parshad v. Karnal Distillery Co.* A.I.R. 1963 S.C. 1279.

4. *Coomber v. Coomber*, [1911] 1 Ch. 174, *affd.* at [1911] 1 Ch. 723 C.A.

In such cases, in regard to transactions *inter vivos*, the onus of proving absence of undue influence lies on the person claiming the benefit of the disposition or act, and in some cases, e.g., gifts by clients to their solicitors (*inter vivos*), the onus can only be discharged by showing not only that the relationship has ceased, but that the donor was acting under independent advice. In the case of wills, the onus, according to English law, is shifted and the person alleging undue influence is called upon for proof of the allegation.¹

Where confidence has been reposed in one party, in the case of a bargain the presumption will be that undue pressure was exercised by the party in the superior position. The party in the superior position has to rebut that presumption by proving that undue influence was not used. If it can be shown that the party seeking to avoid the contract received independent advice before the completion of the contract it will suffice. It is immaterial that the party seeking to avoid the contract did not act according to the advice received.² Where it has been proved that the contract in question was entered into by the other party as the result of his independent judgment, the transaction will be upheld even though he did not receive any independent advice. Thus independent legal advice is not the only way in which the presumption of undue influence can be rebutted. What has to be proved is that the contract or the gift was the result of the free exercise of an independent will. Where it has been established that the transaction was entered into after the nature and effect thereof had been fully explained to the party seeking the avoidance by some disinterested person the Court will be satisfied that the party had acted with the full appreciation of what he was doing and quite independently of any influence from the other party.³ As it has been observed in *In re Coomber*, *Coomber v. Coomber*, [1911] 1 Ch. 723 C.A., it is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it.

It is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred.⁴ In a particular case, the presumption may not even be there. It would not be true, for example, to say that there is a presumption of undue influence in every case where a wife confers a benefit on her husband without consideration.⁵

1. Wharton : *Law Lexicon*, 14th ed., 1953, 1024 ; *Abdul Malick v. Md. Yousuf*, A.I.R. 1961 Mad. 190.

2. *Raghunath v. Jugal*, A.I.R. 1964 Patna 284 ; *Mahboob v. Abdul*, A.I.R. 1964 Raj. 250.

3. *Allcard v. Skinner* (1887), 36 Ch. D. 145, 171 ; *Powell v. Powell*, [1900] 1 Ch. 243, 246 ; *Inche Nariah v. Shaik Allie Bin Omar*, [1929] A.C. 127 ; A.I.R. 1929 P.C. 3 ; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380, 413.

4. *Tungabai v. Yeshwant*, A.I.R. 1945 P.C. 8 ; *Bank of Montreal v. Stuart*, [1911] A.C. 120.

5. *Tungabai v. Yeshwant*, A.I.R. 1945 P.C. 8.

Where the donor is, at the time of the gift, living in the house of the mother of the donee and the gift deed, which covers practically the entire estate, is executed in favour of the sister's son when the son of the donor is alive and has to be provided and there is also the claim of the wife of the son which cannot, at least morally, go unrecognised, the transaction of gift requires not only careful examination but severe scrutiny.¹ Where the relations between the parties at the time of the transaction are such as to raise a presumption that the donee had influence over the donor, the Court must be satisfied that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. In such a case it is not sufficient that the executant knows the nature of the document, she must also realise what its effect on her will be.²

When the parties were not on the same footing and one unduly availed oneself of the other's helplessness, the transaction will be deemed in equity in England as voidable inasmuch as there had been no exercise of independent judgment on the part of the party in the disadvantageous position.³ Where the relation between two persons are such that the one has peculiar opportunities of exercising influence over the other, equity in England imposes a burden on the former of proving that in fact he exercised no influence over the latter in the matter of the conclusion of the contract.⁴ In the case of no fiduciary relationship existing between the two persons, the party seeking to avoid the contract has to prove that undue influence was in fact exerted upon him in the matter of reaching the agreement and that but for such influence it would not be reached at all.⁵

Where although the leave applied for by a Government servant was to his credit the granting of that leave was being delayed, and being in dire need of leave in his then state of mental depression when the servant saw the Deputy Registrar to inquire about the cause of the delay he was given to understand that unless an undertaking in writing was given that he would not return to duty after the expiry of his leave his application might not have early disposal, and it was in this state of affairs that the servant succumbed to the suggestion and gave the required undertaking and his application for leave was then granted, it was held that the relation subsisting at the time between the Deputy Registrar and the servant was such that the former was in a position to dominate the will of the latter. The Deputy Registrar used that position to obtain an unfair advantage over the servant since his consent to give the written undertaking was obtained in return for what the Registrar was bound even otherwise to do, viz., to expedite disposal of the application for leave which was admittedly due to the servant. The consent to the undertaking was induced by undue influence, and the

1. *Hajra v. Dost Mohammad*, A.I.R. 1947 All 180.

2. *Amir Alam v. Bibi Salma*, A.I.R. 1952 Patna 19; *Inche Noriah v. Shaik Allie*, 115 I.C. 733; A.I.R. 1929 P.C. 3; [1929] A.C. 127.

3. *Williams v. Bayley*, (1866), L.R. 1 H.L. 200, 216.

4. *Allcard v. Skinner* (1887), 36 Ch.D. 145, 181.

5. *Ladli Parshad v. Karnal Distillery Co.*, A.I.R. 1963 S.C. 1279.

servant was in consequence not bound by it. The contract would also not be enforceable for want of consideration, since the consideration was unreal.¹ No presumption of undue influence arises from the relationship between an engaged couple or between grand father and grand child.²

Fiduciary relations.—The common law as well as statutory provisions determine fiduciary relationship. The Guardians and Wards Act, 1890, by Section 20, provides that a guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by the Guardians and Wards Act, 1890, must not make any profit out of his office. The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.

The relationship obtaining between parent and child,³ guardian and ward,⁴ religious superior and inferior,⁵ confessor and penitent, solicitor and client,⁶ doctor and patient,⁷ trustee and beneficiary,⁸ is generally taken to be a fiduciary one.⁹ In the very nature of equity, a fiduciary relationship cannot be limited to a few accepted cases. The equitable presumption of undue influence may be, in order to grant equitable relief, applied to variety of relations in which dominion may be exercised by one person over another.¹⁰ Neither can a fiduciary relationship be attributed to every case of confidence reposed between person and person, in order to attract the application of the equitable presumption of undue influence. In order to follow a practicable

1. *U. P. Government v. Bhatta*, A.I.R. 1956 All. 439.

2. *Zamet v. Hyman* [1961] 1 W.L.R. 1442 C.A.; *Narayana v. Narasinha*, A.I.R. 1965 Ker. 189.

3. *Powell v. Powell*, [1900] 1 Ch. 243, 246; *Archer v. Hudson*, (1844) 7 Beav. 551, 560; *Smith v. Kay* (1859), 7 H.L. Cas. 750, 772; *Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380, 421; *Bullock v. Lloyds Bank, Ltd.*, [1955] Ch. 317; [1954] 3 All E.R. 726; *Lakshmi Doss v. Roop Lal*, (1907) 30 Mad. 169.

4. *Hyllon v. Hyllon* (1754), 2 Ves. Sen. 547.

5. *Allcard v. Skinner* (1887) 36 Ch. D. 145, 183; *Manbhari v. Sri Ram*, (1936) A.L.J. 1215; 165 I.C. 240; A.I.R. 1936 All. 672; *Manu Singh v. Umadat*, (1890) 12 All. 523.

6. *McMaster v. Byrne*, [1952] 1 All E.R. 1362; *Liles v. Terry*, [1895] 2 Q.B. 679 C.A.; *Rhodes v. Bate* (1865) L.R. 1 Ch. 252; *Wright v. Carter*, [1903] 1 Ch. 27; *Rajah Papamma v. Sitaramayya* (1895) 5 M.L. J. 234; *Vasireddi v. Unnaya, Subbaya* (1929) M.W.N. 360; 120 I.C. 882; *Mackenzie v. Royal Bank of Canada*, [1934] A.C. 468; 151 I.C. 981; A.I.R. 1934 P.C. 210; *Nisar Ahmad v. Mohan Manucha* (1940) 67 I.A. 431; 43 Bom. L.R. 465; 191 I.C. 94; A.I.R. 1940 P.C. 204; *Brojendra v. Lucky Money* (1901) 6 C.W.N. 816; *Shamaldhone v. Lakshimani* (1908) 36 Cal. 493. *Amrit Lal v. Ram Kumar* (S.B.), A.I.R. 1962 Punj. 325.

7. *Radcliffe v. Price* (1902), 18 T.L.R. 466.

8. *Ellis v. Barker* (1871), 7 Ch. App. 104; *Raghunath v. Varjivandas* (1906) 30 Bom. 578; *Knight v. Marjoribanks* (1849) 2 Mac. & G. 10; 2 H. & Tw. 308. See Sections 46 to 54 of the Indian Trusts Act, 1882.

9. Stroud: *Judicial Dictionary*, 3133.

10. *Huguenin v. Baseley* (1870) 14 Ves. 273, 286; *Dent v. Bennett* (1839), 4 My. & G. 269, 277; *Tate v. Williamson* (1866), 2 Ch. App. 55; *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127; *Tufton v. Sporni* (1952) 2 T.L.R. 516.

course, it has been emphasised that in order to attract the application of the equitable presumption of undue influence, the fiduciary relation must be such that it justifies interference.¹ A mother's gift to her daughter² or a transaction between husband and wife³ does not suffer from the presumption of undue influence. The relationship between a servant⁴ and his master or between subject and the daughter-in-law of the ruler⁵ does not suffer from the presumption of undue influence. In a particular case however the undue influence may be presumed between a trusted servant and the old mistress.⁶ In the case of a *pardanashin* lady, again, the onus of proving the fairness of a transaction lies on the husband as the donee.⁷

In cases in which a person acquires an influence and then abuses it or confidence is reposed which subsequently is betrayed, a fiduciary relation is said to exist regardless of the origin of confidence and the source of influence. The rule embraces both technical fiduciary relations and those formal relations which exist whenever one man places his trust in and relies upon another.

A person *in loco parentis* is a person who, though not a parent, assumes the parental character or discharges parental duty. The elder brother in a Hindu family may be, especially after the death of the father, a person *in loco parentis* in relation to the younger brother.

A person who is not *in loco parentis* to the other party may still stand in a fiduciary relation to him. The term 'fiduciary relation' is a broad one and not susceptible of a precise definition. An elder sister's husband managing an estate was held as standing in a fiduciary relation to two younger sisters in the cases of an unconscionable bargain.⁸ The *malik* is placed in the position of a fiduciary relation *vis-a-vis* his cultivator.⁹

Mental incapacity.—Age, capacity, or infirmity of body or mind of the donor is a vital factor in the matter of impeachment of unconscionable bargains.¹⁰ Under clause (b) of sub-section (2) of Section 16 there will be a statutory presumption of a person's dominion over another's mind where the former makes a contract with the latter when the mental capacity of such latter person is temporarily or permanently affected by age, illness, or mental or bodily distress. In order to render Section 16 (2) (b) applicable,

1. *In re Coomber*. *Coomber v. Coomber*, [1911] 1 Ch. 723, 728.

2. *Ismail Mussajee v. Hafiz Boo*, (1906) 33 Cal. 773 : 33 I.A. 86.

3. *Sarfaraz Ali Khan u. Ahmad Kamil*, (1944) All. 141 : 214 I.C. 135 : A.I.R. 1944 All 104; *Bank of Montreal v. Stuart*, [1911] A.C. 120.

4. *Daulat v. Gulabrao*, 88 I.C. 295 : A.I.R. 1925 Nag. 369.

5. *Bhagwan Pancha v. Nayankunvarba*, A.I.R. 1953 Sau. 53.

6. *Bhagwan Das v. Mt. Bitton*, (1945) All. 148 : A.I.R. 1945 All. 227.

7. *Moonshee Bazloor Ruheem v. Shumsoonissa Begum* (1867), 11 M.I.A. 551.

8. *Palanivelu v. Neelavathi*, 39 Bom. L.R. 720 : 167 I.C. 5 : A.I.R. 1937 P.C. 50; *Subamma v. Mohamed Abdul*, A.I.R. 1950 Hyd. 55.

9. *Kashi Nath v. Durga Prasad*, (1916) 1 Pat. L. J. 604.

10. *Rhades v. Bate* (1866) 1 Ch. 252, 257; *Lancashire Loans v. Black* [1934] 1 K.B. 380, 413; *McMaster v. Byrne*, [1952] 1 All E.R. 1362 P.C.; *Bhola Ram v. Peari Devi*, A.I.R. 1962 Patna 168.

the element of mental incapacity must be a constituent in the formation of an unconscionable bargain. If the donee can prove that he has not used his dominant position to obtain an unfair advantage over the other party, the transaction will stand. When the burden of proof has been discharged by the donee, the factum of mental incapacity of the donor will not invalidate a transaction even though the consideration appears inadequate to the Court.¹ The mental incapacity of the donor and an abuse of such incapacity on the part of the donee will render an unconscionable transaction voidable.² In the absence of an abuse of the mental incapacity of the donor, an unfavourable bargain cannot be set aside by a party of a weak intellect or his representative.³

Pardanashin ladies.—The ordinary presumption that an executant understands the implications of his or her transactions or those of the documents executed by him or her does not apply in the case of a *pardanashin* lady.⁴

Pardanashin ladies are ladies who have no much intercourse with the outside world. Living in some degree of seclusion is not enough to entitle a lady to the protection which the Court accords to a *pardanashin* lady. A woman having experience of commerce or business in the outside world is not *pardanashin*.⁵ In most cases it will depend in each case on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute.⁶

The case of an illiterate *pardanashin* lady, denuding herself of a large proportion of her property without professional or independent advice is one on which there is much authority.⁷ Independent legal advice is not itself essen-

1. *Gobardhan Das v. Jai Kishen Das*, (1900) 22 All. 224; *Masjidi v. Mt. Ayisha* (1882) Punj. Rec. No. 135; *Amjadnessa v. Rahim Buksh*, (1915) 42 Cal. 286; *Bara Estate, Ltd. v. Anup Chand* (1917) 2 Pat. L. J. 663, 670; 41 I.C. 337.

2. *Ranganayakamma v. Alwar Setti* (1889) 13 Mad. 214; *Sital Prasad v. Parbhu Lal*, (1888) 10 All. 535; *Abdur Rauff v. Aymona*, A.I.R. 1937 Cal. 492; *Pudishary Krishnen v. Karampally* (1874) M.H.C. 378; *Kessouji v. Hurjivan* (1887) 11 Bom. 566; *Rangnath v. Govind*, (1904) 28 Bom. 639.

3. *Ram Sundar v. Raj Kumar*, (1927) 55 Cal. 285; 104 I.C. 527; A.I.R. 1927 Cal. 889.

4. *Ashgar Ali v. Banoo Begum*, (1877) 3 Cal. 324; *Mariam v. Sakina* (1892) 14 All. 8; *Acchhan Kuar v. Thakur Das*, (1895) 17 All. 125; *Hoti Lal v. Musammatt*, (1903) Punj. Rec. No. 77. *Kharbuja v. Jangbahadur* A.I.R. 1963 S.C. 1203. *Geresh v. Bhuggobutty* (1869-70) 13 Moo. I.A. 419 P.C.; *Kali Bakhsh v. Ram Gopal* (1913-14) 41 I.A. 23 P.C.; (1914) 36 All. 81 P.C.; *Farid-un-Nisa v. Mukhtar Ahmad* (1924-25) 52 I.A. 342 P.C.; A.I.R. 1925 P.C. 204; *Hem Chandra v. Suradhani* (1940) 2 Cal. 436 P.C.; A.I.R. 1940 P.C. 134. *Bhola Ram v. Peari Devi* A.I.R. 1962 Patna 168.

5. *Shahk Ismail v. Amirbibi*, (1902) 4 Bom. L.R. 146, 148; *Ismail Mussajee v. Hafiz Boo*, (1906) 33 I.A. 86; 33 Cal. 773, 783; *Nagendra Nath v. Nagendra Bala* A.I.R. 1926 Cal. 988.

6. *Sonia Parshini v. Moula Baksha* A.I.R. 1955 Cal. 17; *Hodges v. Delhi and London Bank*, (1901) 27 I.A. 168, 175-76; 23 All. 137, 145.

7. *Ramanamma v. Viranna*, A.I.R. 1931 P.C. 100; 35 C.W.N. 633; 33 Bom. L.R. 960; 131 I.C. 401; *Nawab Sikandar Begam v. Zulfikar*, A.I.R. 1938 P.C. 38; 40 Bom. L.R. 697; 172 I.C. 720; *People's Bank v. Ghulam Jan*, A.I.R. 1938 P.C. 276; (1938) 2 M.L.J. 902; 176 I.C. 773; *Lachmeshwar v. Moti Ram* A.I.R. 1939 P.C. 157; 41 Bom. L.R. 1068; 43 C.W.N. 729. *Kharbuja v. Jangbahadur* A.I.R. 1963 S.C. 1203.

tial. After all, advice, if given, might have been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it.¹ Mere reading of the document to a *pardanashin* woman is not enough. The Court must be satisfied that it was understood by her.² Where the relations between the parties at the time of the transaction are such as to raise a presumption that the donee had influence over the donor, the Court must be satisfied that the gift was the spontaneous act of the donor acting under circumstances which enabled her to exercise an independent will. In such a case it is not sufficient that the executant knows the nature of the document, she must also realise what its effect on her will be.³ The possession of independent advice or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction.⁴ If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. The state of the settlor's mind is to be proved by the party who sets up and relies on the deed. Such a party must satisfy the Court that the deed had been explained to and understood by the other party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension⁵. The emphasis is on the factual understanding of the document in each individual case with reference to the individual concerned and not upon presumptive disability incidental to the mere status of

1. *Farid-un-Nisa v. Mukhtar Ahmad*, 47 All. 703 : A.I.R. 1925 P.C. 204 : 52 I.A. 342 ; *Wajid Khan v. Ewaz Ali Khan*, 18 Cal. 545 P.C. : 18 I.A. 144 ; *Sunitibala v. Dhara Sundari*, 46 I.A. 272 : A.I.R. 1919 P.C. 24 ; *Pragash v. Dulhin*, A.I.R. 1951 Pat. 457 ; *Subhas Chandra v. Subasini*, A.I.R. 1951 Assam 46 ; *Ramanamma v. Viranna*, 131 I.C. 401 : A.I.R. 1931 P.C. 100 ; *Nathusa v. Mohammad Siddique*, (1941) Nag. 418 : A.I.R. 1939 Nag. 159 ; *Jugal Kishore v. Charoo*, A.I.R. 1939 P.C. 159.

2. *Bibi Saleha v. Zakariya*, A.I.R. 1950 Patna 247 ; *Geresh Chunder v. Bhuggobutty*, (1870) 13 M.I.A. 419, 431 ; *Sudisht Lal v. Sheobarat Koer*, (1881) 8 I.A. 39 : 7 Cal. 245 ; *Behari Lal v. Habiba*, (1886) 8 All. 267 ; *Annoda Mohun v. Bhuban Mohini*, (1901) 28 I.A. 71 : 28 Cal. 546 ; *Sham Koer v. Dah Koer* (1901) 29 I.A. 132 : 29 Cal. 664 ; *Shambati Koeri v. Jago Bibi* (1902) 29 I.A. 127 : 29 Cal. 749 ; *Sumsuddin v. Abdul* (1907) 31 Bom. 165 ; *Mirza Sajjad Husain v. Wazir Ali* (1912) 39 I.A. 156 ; *Kali Baksh v. Ram Gopal* (1913) 41 I.A. 23, 29 : 36 All. 81, 89 : 21 I.C. 985 ; *Sri Kishan Lal v. Kashmira*, (1916) 14 All. L.J. 1236 : 34 I.C. 37 P.C. ; *Farid-un-Nisa v. Mukhtar Ahmad*, (1925) 52 I.A. 342 : 89 I.C. 649 : A.I.R. 1925 P.C. 204 ; *Barkatunnissa v. Debi Baksh*, 101 I.C. 29 : 25 All. L.J. 314 : (1927) 31 C.W.N. 693 : A.I.R. 1927 P.C. 84.

3. *Amir Alam v. Bibi Salma*, A.I.R. 1932 Pat. 10 ; *Irshat Nuriak v. Shaik Allie*, 115 I.C. 733 : A.I.R. 1929 P.C. 3 ; *Wajid Khan v. Ewaz Ali* (1891) 18 I.A. 144 : 18 Cal. 545.

4. *Kali Baksh v. Ram Gopal*, 36 All. 81 P.C. : 41 I.A. 23.

5. *Sudisht Lal v. Sheobarat*, 7 Cal. 245 P.C. : 8 I.A. 39 ; *Sham Bati v. Jago Bibi*, 29 Cal. 749 P.C. : 29 I.A. 127 ; *Sajjad Hussain v. Amid Hussain*, 34 All 455 P.C. : 39 I.A. 156 ; *Sikandar Begam v. Zulfikar Wali*, 172 I.C. 720 : A.I.R. 1938 P.C. 38.

a *pardanashin* or illiterate woman.¹ Mere execution by person under disability, although unaccompanied by duress, protest, or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor, and where necessary, explained.²

The law throws around a *pardanashin* woman a special cloak of protection. It demands that the burden of proof shall in such case rest not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by but was explained to and was really understood by the grantor. It must also be established that the deed was not signed under duress but arose from the free and independent will of the grantor.³ The test of good faith should be the fairness of the bargain. Hard bargaining evidenced by a grossly inadequate consideration is sufficient to make the whole thing suspect in the eye of the law. The transaction will be scrutinised to see that it is a fair one.⁴

The protection given to *pardanashin* ladies is given to persons who are really kept in seclusion and have little or no commerce with the outside world. It is the duty of the Court before upholding transactions with a *pardanashin* lady to satisfy itself that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. Independent legal advice is not in itself essential. The presence or absence of independent legal advice is only relevant to a decision of the question as to whether or not the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction. What is necessary to establish is that the import of the document was brought home to the mind of the grantor, and that she really understood and meant to make the transfer. If the settlor's freedom and comprehension can be established or if it is proved that the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. Further, it is not necessary that she should understand each detail of a matter which might be involved in legal technicalities. It is enough if the general

1. *Hodges v. Delhi & London Bank, Ltd.*, 23 All. 137 P.C. : 27 I.A. 168.

2. *Sonia v. Moula Baksha*, A.I.R. 1955 Cal. 17; *Farid-un-Nisa v. Mukhtar Ahmad*, 47 All. 703 : 52 I.A. 342 : A.I.R. 1925 P.C. 204.

3. *Farid-un-Nisa v. Mukhtar Ahmad*, A.I.R. 1925 P.C. 204; *Sonia v. Moula Baksha*, A.I.R. 1955 Cal. 17; *Sajjad Hussain v. Wazir Ali*, 34 All. 455 : 39 I.A. 156; *Md. Ibrahim v. Umatullah*, (1917) Punj. Rec. No. 90, 350 : 39 I.C. 798; *Kali Bakhsh v. Ram Gopal*, 36 All. 81, 89 : 41 I.A. 23, 29 : 21 I.C. 985; *Vinayak v. Hanif*, A.I.R. 1954 Nag. 11.

4. *Sonia v. Moula Baksha*, A.I.R. 1955 Cal. 17; *Nibaran v. Nirupama*, A.I.R. 1921 Cal. 131 : 26 C.W.N. 517 : 34 C.L.J. 563; *Tara Kumari v. Chandra*, 11 Pat. 227 : A.I.R. 1931 P.C. 303; *Krishna v. Nagendra*, A.I.R. 1921 Cal. 435 : 34 C.L.J. 333.

result of the transaction is understood by the lady. But even if intelligent understanding of the deed is established, a question of undue influence may still arise. Such influence may be direct and expressly used by a donee or transferee for the purpose or the relation between the donor or transferor and the donee or transferee may be such as to raise a presumption of undue influence.

Where undue influence is alleged, it is necessary to examine very closely all the circumstances of the case. It has to be examined (a) whether the transaction is a righteous one, that is, whether it was a thing which a right-minded person might be expected to do; (b) whether it was an improvident act, that is, whether it shows so much improvidence so as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing; (c) whether it was a matter requiring a legal adviser; and (d) whether the intention of making the gift or transfer originated with the donor or transferor.¹

The plaintiff an illiterate *pardanashin* woman executed a deed by which she purported to transfer her mutwaliship in favour of her *ammukhtear* B who was in charge of her properties and was looking after her estate. B was thus in some sort of fiduciary relationship with the plaintiff and was in a position to dominate her will. In a suit by the plaintiff for declaration of her title to *wakf* properties the defendants contended that the plaintiff's title had been extinguished by reason of the deed of transfer in favour of B. A heavy onus lay upon the contesting defendants to prove that the deed executed by the plaintiff was validly executed so as to be binding against an illiterate *pardanashin* woman and the evidence would have to be scanned from the point of view of the well-settled judicial principles governing such a case.²

A young widow signed an agreement of partition which was unfair and prejudicial to the interests of her minor sons. At the time of its execution she was ill and in bereavement of her husband's death and had had no independent advice. The other party to the agreement who was her step-son was in a position to dominate her will and she was actually under restraint at the time of its execution. In the circumstances, it was presumed by the Court that the widow's consent to the agreement was induced by undue influence and the burden of rebutting that presumption lay heavily on the other party.³

In cases of documents executed by ignorant and illiterate persons it is difficult to draw the usual presumption arising under Section 114 of the

1. *Karunamoyee v. Maya Moyi*, A.I.R. 1948 Cal. 84; *Mahomed Buksh v. Hosseini Bibi* 15 Cal. 684 P.C.: 15 I.A. 81; *Sunitibala v. Dhara Sundari* (1919) 46 I.A. 272, 278; *Pattu Kumari v. Nirmal Kumar*, A.I.R. 1939 Cal. 569: 43 C.W.N. 907: 185 I.C.691.

2. *Abdul v. Mutwali of Janebali*, A.I.R. 1956 Cal. 584; *Satiş v. Kalidasi*, A.I.R. 1922 Cal. 203; *Farid-un-Nisa v. Mukhtar Ahmad*, A.I.R. 1925 P.C. 204; *Karunamoyee v. Maya Moyi*, A.I.R. 1948 Cal. 84; *Bank of Khulna v. Jyoti Prakash Mitra*, A.I.R. 1940 P.C. 147.

3. *Hiralal v. Fulchand*, A.I.R. 1956 Saurashtra 89; *Abdur Rauff v. Ajmona Bibi*, A.I.R. 1937 Cal. 492.

Evidence Act.¹ In case of unconscionable bargains, the knowledge as to the nature and effect of the contents on the part of the executant has always been emphasised.² A contract was written in English, signed by a party in Hindi under a line in Urdu to the effect that the party signing understood the conditions. The party signing the contract was deemed to have been aware of the conditions.³

There is no absolute rule as to the necessity or sufficiency of independent advice in favour of an ignorant person as the donor. When however an independent advice is alleged to have been relied on, the advice given must be proved to have been given with knowledge of all relevant circumstances and must appear to the Court to be such as a competent and honest adviser would give if acting solely in the interests of the donor.⁴

As noted earlier, independent advice to a *pardanashin* lady is not insisted on as a matter of rule. If the general result of the transaction is understood by the lady and the transaction is not unconscionable, it will be upheld.⁵ The possession of independent advice or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor, as well as the approximate circumstances affecting the execution if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand. While the Courts support and approve of the protection given by law to a *pardanashin* lady, they would not transmute such a legal protection into a legal disability. In short, if independent outside advice, which is an essentially different thing from independent outside control, would have resulted in the same sort of transaction as the *pardanashin* lady has entered into, it will be upheld.⁶

1. *Nathu Kalu v. Anadilal*, A.I.R. 1953 M.B. 32 (Indore).

2. *Udebhan v. Vithoba*, (1939) Nag. 160; A.I.R. 1939 Nag. 78; *Omanhene Kwamin v. Omanhene Bendentu*, 170 I.C. 423; A.I.R. 1937 P.C. 274; *Hoe Moh v. Seedat*, 5 Rang. 527; A.I.R. 1927 Rang. 319; *Ebadut Ali v. Mohammad Fareed*, 35 I.C. 56; A.I.R. 1916 Patna 206; *Pirbhu Dayal v. Tula Ram*, 68 I.C. 809; A.I.R. 1922 All. 401; *Maung Bya v. Maung Po*, 4 Bur. L.T. 202; 11 I.C. 916; *Ramlakhan v. Gog Singh*, 134 I.C. 635; A.I.R. 1931 Pat. 219; *Nathu Kalu v. Anadilal*, A.I.R. 1953 M.B. 32 (Indore).

3. *Mitha Shah v. Devi Dass*, A.I.R. 1944 Pesh. 33.

4. *Inche Noriah v. Shaik Allie*, [1929] A.C. 127, 135; *Ram Sumran v. Gobind Das*, (1926) Patna 646, 661; 99 I.C. 782; A.I.R. 1926 Patna 582; *Mt. Sewti v. Rattan*, A.I.R. 1951 H.P. 54.

5. *Sunitibala v. Dhara Sundari*, (1919) 46 I.A. 272, 278; *Pattu Kumari v. Nirmal Kumar*, 43 C.W.N. 907; 185 I.C. 691; A.I.R. 1939 Cal. 569; *Kali Bakhsh v. Ram Gopal*, (1913-14) 41 I.A. 23 P.C.; (1914) 36 All. 81 P.C.; *Sattemma v. Subbi*, A.I.R. 1963 Andhra 72.

6. *Kali Bakhsh v. Ram Gopal*, 36 All. 81, 89; (1913) 41 I.A. 23, 29; 21 I.C. 985; *Keshub Lall v. Radha Raman*, (1913) 17 C.W.N. 991; *Mahatur Prasad v. Taj Begum*, (1915) 19 C.W.N. 162; *Mahomed Buksh v. Hosseini Bibi*, (1888) 15 I.A. 81; 15 Cal. 684; *Barkatunnissa*

The undue influence which may affect a *pardanashin* lady's understanding of a document or transaction may not always proceed from the donee or transferee himself but it may proceed also from a third party. Even the husband's influence may be taken as an undue one in favour of the donee or transferee.¹

Proof of undue influence.—The party pleading undue influence will have to establish that the opposite party had an influence over him either because of the close relationship existing or due to other circumstances, and by exercising that influence he took unfair advantage at his cost. Once these factors are established then it is for the other side to establish the validity of the transaction. In deciding the question of undue influence an overall view of the case will have to be taken. The exercise of undue influence will ordinarily be a matter of inference from proved facts. The character of the transaction is one of the important circumstances that will be considered, though no single circumstance, including the unfairness of the transaction, is conclusive.²

The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule.³

The law does not require that there should be direct evidence of actual exercise of undue influence. Having regard to the relationship of the parties, the course of dealings, the position of vantage occupied by the person who is alleged to have exercised undue influence, the undue benefits derived by him in consequence of that position, and from the consideration of the further consideration set out in Section 16 of the Contract Act it is open to the Court to draw a presumption in favour of the exercise of undue influence.

For purposes of determining the exercise of undue influence, the first question that requires examination is whether the person alleged to have exercised undue influence was in a position to dominate the will of the other party. Secondly, it has to be seen whether he used that position to obtain an unfair advantage over the other party. Thirdly, if it be found that he held a real or apparent authority over the other party or that he stood in a fiduciary relation to the other party, he would be deemed to be in a position to dominate the will of the other party. Lastly, if it be found that the person was in a position to dominate the will of the other party and the contract or

Begum v. Debi Bakhsh, A.I.R. 1927 P.C. 84 : 31 C.W.N. 693 : 101 I.C. 29 ; *Lala Kundan Lal v. Musharrafi*, (1936) 63 I.A. 326 : 11 Luck. 346 : 163 I.C. 156 : A.I.R. 1936 P.C. 207 ; *Kanchanlal v. Hariprasad*, A.I.R. 1951 Nagpur 379.

1. *Badiatnnessa v. Ambika*, (1914) 18 C.W.N. 1133 ; *Tungabai v. Yeshvant*, (1945) Bom. 189 : 47 Bom. L.R. 242 : 220 I.C. 362 : A.I.R. 1945 P.C. 8 ; *Bank of Montreal v. Stuart*, [1911] A.C. 120 P.C.

2. *Saley Mohamed v. Khanmull*, A.I.R. 1959 Mysore 102 ; *Raghunath v. Sarju*, 3 Pat. 279 P.C. : (1923) 51 I.A. 101 : 82 I.C. 817 : A.I.R. 1924 P.C. 60 ; *Hamsed v. Abdulla*, (F.B.), 4 D.L.R. (Coch.) 222.

3. *Palanivelu v. Neelavathi*, A.I.R. 1937 P.C. 50 ; *Zamet v. Hyman*, [1961] 1 W.L.R. 1442 C.A. ; *Narayana v. Narasinha*, A.I.R. 1965 Ker. 189.

transaction entered into by him appears on the face of it or on evidence adduced to be unconscionable, the burden of proving that the contract in question was not induced by undue influence will lie upon the person in a position to dominate the will of the other party. The unconscionableness of the bargain is thus not the first thing to be considered. The relations between the parties to each other have to be first considered.¹

In dealing with the cases of undue influence the Court has to consider four different questions connected with each other namely, (i) whether a transaction is a righteous transaction, *i.e.*, whether it is a thing which a right-minded person might be expected to do; (ii) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the executant was not master of himself and not in a state of mind to weigh what he was doing; (iii) whether it was a matter which required legal advice; and (iv) whether the intention of executing the document originated with the executant or with the executee.² All these aspects of the question become relevant only when there is either proof or presumption of undue influence.³

In the case of a gift, where fiduciary relationship exists between the parties, the party taking the benefit, that is, the donee should establish that he has acted honestly and *bona fide*, without influencing the donor who has acted independently of him. But when both the parties have adduced evidence the burden of proof becomes immaterial.⁴ An unconscionable trust will also be governed by the same principle.⁵

The question of undue influence is a question of fact and has to be accordingly proved.⁶

Cases of undue influence.—The cases in which a contract may be rescinded for undue influence fall into two groups, namely, (i) Those in which

1. *Karnal Distillery v. Ladli Parshad*, A.I.R. 1958 Punjab 190; *Mohanlal v. Kashiram*, A.I.R. 1950 Nag. 71; *Reshmi v. Ghungaria*, A.I.R. 1952 H.P. 20; *Raghunath v. Sarju Prasad*, 3 Pat. 279; A.I.R. 1924 P.C. 60; *Poosathurai v. Kannappa*, 43 Mad. 546; A.I.R. 1920 P.C. 65; *Sanwal v. Kuremal*, (1927) 9 Lah. 470; 109 I.C. 729; A.I.R. 1928 Lah. 224; *Kanto Mohan v. Galstaun*, A.I.R. 1930 Cal. 547; *Balla Mal v. Ahad Shah*, A.I.R. 1918 P.C. 249; *Bahore Mahton v. Juro Sahu*, 160 I.C. 1073; A.I.R. 1936 Patna 78; *Gafur Md. v. Md. Sharif*, A.I.R. 1932 P.C. 202; 34 Bom. L.R. 1194; 36 C.W.N. 994; 137 I.C. 893; *Latif Jahan v. Md. Nabi*, A.I.R. 1932 All. 174; (1932) All. L.J. 9; 137 I.C. 231; *Santhappa v. Santhiraja*, A.I.R. 1938 Mad. 426; (1938) 1 M.L.J. 676; 178 I.C. 563.

2. *Thrasia v. Varkey*, A.I.R. 1951 T.C. 42; *Mahomed Buksh v. Hosseini Bibi*, (1888) 15 Cal. 684, 698-700; 15 I.A. 81, 92-93; *Karunamoyee v. Maya Moyi*, A.I.R. 1948 Cal. 84.

3. *Venkatarama v. Krishnammal*, (1927) 52 M.L.J. 20; 99 I.C. 571; A.I.R. 1927 Mad. 255.

4. *Nanjamma v. Lingappa*, (F.B.) 4 D.L.R. (Mys.) 118; *Shiugangawa v. Basangonda* A.I.R. 1938 Bom. 304; *Wajid Khan v. Ewaz Ali*, 18 Cal. 545; 18 I.A. 144; *Mariam Bibi v. Malim*, (1940) Rang. L.R. 35; A.I.R. 1939 Rang. 278; 184 I.C. 171.

5. *Lakshmi Doss v. Roop Loll*, (1907) 30 Mad. 169.

6. *Narayana Dass v. Buchraj Chordia*, (1927) 53 M.L.J. 842; 106 I.C. 315; A.I.R. 1928 Mad. 6; *Parbhu v. Puttu*, (1926) 1 Luck. 144; 95 I.C. 995; *Tirath Ram v. Harbhajan*, A.I.R. 1935 Lah. 479; 158 I.C. 257. *Narayana v. Narasimha*, A.I.R. 1965 Ker. 189.

the parties come within certain specified relations, such as parent and child, solicitor and client, religious superior and inferior. Here undue influence is presumed to have been exercised, and the burden of rebutting this presumption lies upon the defendant. See *Presumption of undue influence, supra*.

(ii) Those in which no special relation exists between the parties. Here the burden lies upon the plaintiff of proving that undue influence has in fact been exercised.

The plaintiff must, in England, seek relief within a reasonable time after the removal of the influence under which the contract was made.¹ In England in a Court of equity a contract effected through undue influence will be set aside at the instance of the party influenced.² Though delay of itself is no bar to relief in equity in England, laches on the part of the plaintiff will be construed as an implied affirmation of a contract or transaction which could be avoided on ground of undue influence.³ Even where there has been no laches, a transaction effected through undue influence cannot be avoided against third parties who have acquired rights under the voidable contract for value and without notice of the facts leading to the said contract. When, however, the third party had had notice of the facts rendering the earlier transaction voidable, the presence of consideration moving from him will not avail him. A third party, again, will be required to restitute the property when he had received it without any consideration, even though he did not have any notice of the undue influence.⁴ Thus, when a third party who benefits by a transaction has notice of the facts which raise the presumption he is in no better position than the person who exercises the influence.⁵

The equitable doctrine of undue influence in England covers cases of undue influence not only in particular relations but also cases of coercion or pressure outside the said special relations. Relief in equity is thus not restricted to cases of fiduciary relationship strictly so called but is granted in all cases where influence is acquired and abused, where confidence is reposed and betrayed.

A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.⁶

A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant to agree to pay B an unreasonable sum for his

1. *Allcard v. Skinner* (1887), 36 Ch. D. 145.

2. *Bullock v. Lloyds Bank, Ltd.*, [1955] Ch. 317 : [1954] 3 All E.R. 726.

3. *Allcard v. Skinner* (1887), 36 Ch. D. 145 ; *Morley v. Loughnan*, [1893] 1 Ch. 736.

4. *Bainbridge v. Broune* (1881), 18 Ch. D. 188 ; *Maitland v. Irving*, (1846) 15 Sim. 437 ; *Lancashire Loans, Ltd. v. Black* [1934], 1 K.B. 380 ; *Bridgeman v. Green*, (1757) Wilm. 58, 65.

5. *Tungabai v. Yeshwant*, A.I.R. 1945 P.C. 8 ; *Radatamassa v. Ambika*, A.I.R. 1914 Cal. 223 : 18 C.W.N. 1133.

6. Illustration (a) to Section 16 ; *Carpenter v. Heriot*, 1759) 1 Eden 338.

professional services. *B* employs undue influence.¹

When a person is in a position to dominate the will of another and obtains an unfair advantage thereby, the transaction will be set aside. In such a case the burden of proving good faith is on the person who relies on the same. When it is proved that the transferee under a combined gift and sale deed, standing in near relationship to the transferor took advantage of his position and was in a position to dominate the will of the transferor and that the transaction was unconscionable and unfair, the deed of transfer is liable to be set aside. The burden of proving good faith is on the transferee who, being a near relation and having full opportunity of influencing the transferor oppressed by illness and old age and deserted by his son, takes undue advantage over such transfer and uses the same for unduly benefiting himself; and if he fails to discharge that burden, the deed has to be set aside as being not a *bona fide* transaction.²

For the application of Section 16, it is essential that one of the parties should be in a position to dominate the will of the other.³

Undue influence may exist where a promise is extracted by a threat to prosecute a certain person unless the promise is given. It is not necessary that there should be any direct threat. It may be enough if the undertaking is given owing to a desire to prevent a prosecution, and that desire is known to those to whom the undertaking is given. Undue influence usually arises in contracts made between relatives or persons in a fiduciary position. But even as between strangers between whom there exists no fiduciary relation certain forms of coercion, oppression or compulsion may amount to undue influence invalidating a contract. Just as a contract may be invalid because it is contrary to public policy in its substance or its purpose, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement.⁴

What is implied by the term "fiduciary relationship" is that one person stands in a position of trust in relation to another. It is not however every fiduciary relationship which can be deemed sufficient to lead to the inference that the person standing in such relation to another is in a position to dominate his will. But where a person is employed as a general agent and manager by another person who is in embarrassing financial circumstances and has to fight out a big litigation and the agent not only looks after the litigation of his employer but also has the duty of securing loans for the litigation as well

1. Illustration (b) to Section 16 ; *Diala Ram v. Sargha*, A.I.R. 1927 Lah. 536 : 102 I.C. 707.

2. *Hameed v. Abdulla*, (F.B.) 4 D.L.R. (Coch.) 222.

3. *Raghunath v. Sarju*, (1923) 3 Pat. 279 : 51 I.A. 101 : 82 I.C. 817 : A.I.R. 1924 P.C. 60 ; *Sanwal v. Kure Mal*, (1927) 9 Lah. 470 : 109 I.C. 729 : A.I.R. 1928 Lah. 224 ; *Gafur Mohammad v. Mohammad Sharif*, 34 Bom. L.R. 1194 : 36 C.W.N. 994 : 137 I.C. 893 : A.I.R. 1932 P.C. 202 ; *Latif Jahan v. Mahomed Nabi*, (1932) All. L.J. 9 : 137 I.C. 231 : A.I.R. 1932 All. 174 ; *Bahore Mahton v. Juro Sahu*, 160 I.C. 1073 : A.I.R. 1936 Pat. 78 ; *Santhappa v. Santhiraja*, 178 I.C. 563 : (1938) 1 M.L.J. 676 : A.I.R. 1938 Mad. 426.

4. *London & Lancashire Insurance Co. Ltd. v. Binay Krishna*, A.I.R. 1945 Cal. 218.

as for his employer's household expenses, it is legitimate to infer that he is in a position to dominate his employer's will, even if the employer is an astute person and a man of understanding. Such person is also one who stands in a position of active confidence to the employer within the meaning of Section 111 of the Evidence Act.¹

When the parties to a transaction do not stand upon an equal footing, the law raises in a suitable case a presumption of fraud. In order to bind persons who, by their acts or contracts, have divested themselves of the bulk of their property, there must be a free and full consent, and in transactions in which one of the parties is not a free and voluntary agent and is unable to appreciate the import of what he does, the main elements which render the act his own are wanting. Accordingly, when a person, who from his state of mind, age, weakness, or other peculiar circumstances is incapable of exercising a free discretion, is induced by another to do that which may tend to injure him, that other is not allowed to derive any benefit from his improper conduct. When in addition, one of the two parties stands in a fiduciary relationship to the other, confidence is naturally reposed by one and the influence which grows out of that confidence is possessed by the other. If this confidence is abused, and the influence is exercised to obtain an advantage at the expense of the confiding party the obtaining of property or any benefit through the unconscious abuse of influence constitutes fraud of the gravest character.²

A trustee may buy trust property from a *cestui que trust*, but if a transaction of the kind is challenged, in England, in proper time, a Court will examine into it, will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value, and that all information was laid before the *cestui que trust* when it was sold.³

The fact that a wife remonstrates with her husband on his extravagance, even if she does so in a loud voice does not prove undue influence. So also the fact that a man loves his wife and, at her request, gives her some money—even substantial sums of money—or fixes an allowance for her or provides her with a residence, does not prove that the wife had undue influence upon the husband, and that every request—even importunity—does not amount to undue influence.⁴

A guarantee given by A acting on behalf of a company consisting of himself and his brother B and his father C, and obtained under an implied threat to prosecute B for an illegal forgery, the recipient of the guarantee knowing that A only gave the guarantee because he thought that the shock of B's prosecution would endanger the life of C, was held as obtained by undue influence

1. *Sant Bux v. Ali Raza*, A.I.R. 1946 Oudh 129.

2. *Ram Kalap v. Banshidhar*, A.I.R. 1947 Oudh 89; *Smith v. Kay*, (1859), 7 H.L.C. 750 : 30 L.J. Ch. 45; *Allcard v. Skinner* (1887), 36 Ch. D. 145 : 56 L.J. Ch. 1052 : 57 L.T. 61 : 36 W.R. 251.

3. *Thomson v. Eastwood*, 2 App. Ca. 236; *Dougan v. Macpherson*, [1902] A.C. 197.

4. *Sarfaraz Ali v. Ahmad Kamil Mustafa*, A.I.R. 1944 All 104.

and voidable. A contract so obtained remains voidable so long as the undue influence persists.¹

The donee was in illicit connection with the donor's daughter, and in view of this connection he had given up residing in his own house and was putting up with the donor and his daughter. The daughter and, for the matter of that, her paramour, the donee, must be held to have been in a position to dominate the donor's will. The gift of the entire property to the donee by the donor ignoring his daughter and daughter's daughter made the transaction unconscionable. These two circumstances conjointly made out the presumption that the gift deed was brought about under undue influence.²

The *kabuliats* executed by the tenants contained a clause to the effect that if the whole or any part of the leasehold land was acquired by the Government, any Company, or Railway, the entire compensation money would be paid to the lessors and their heirs, and the lessees would get only a proportionate remission of rent. The tenants did not pay any *salami* though they agreed to pay rent. The payment of compensation money really took the place of payment of *salami*, and became a consideration for the landlords having originally made over possession of the lands to the tenants. Hence there was nothing unconscionable in the transaction.³

A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.⁴

A landlord who merely seeks his legal remedy for the ejectment of a tenant cannot be said to dominate the will of the tenant or to obtain an unfair advantage over him within the meaning of Section 16 of the Contract Act to obtain an agreement from the tenant to pay enhanced rent.⁵

Unconscionable bargains.—Following *Dhanipal Das v. Raja Maneshar Bakhsh*, (1906) 33 I.A. 118, 127 P.C. and dissenting from *Balkishan Das v. Madan Lal*, (1907) 29 All. 303, it was held in *Kesavulu v. Arithulai*, (1913) 36 Mad. 533, by Sir Charles Arnold White, C.J., and Sankaran Nair, J., of the Madras High Court, that it was not open to a Court to reduce the rate of interest in a promissory note unless the stipulation as to interest was obtained by the exercise of undue influence as defined in Section 16 of the Contract Act. According to the learned Chief Justice, it was not open to the Court on general equitable grounds to interfere with the contract between the parties unless it was satisfied that the contract was brought about by the exercise of undue influence. Sankaran Nair, J., on the other hand, observed that excessive interest in itself might not be ground for relief but it might be evidence

1. *Mutual Finance, Ltd. v. John Wetton & Sons, Ltd.*, [1937] 2 K.B. 389.

2. *Ram Chander v. Sital Prasad*, A.I.R. 1948 Patna 130.

3. *Radha Gobinda v. Dibakar*, (F.B.), A.I.R. 1960 Patna 194.

4. Illustration (d) to Section 16.

5. *Lakshmi Chand v. Niader Lal*, A.I.R. 1961 All 295.

of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditors. In *Appa Rau v. Suryanarayana*, 10 Mad. 203, it was observed that the true principle of decision was that a Court should not interfere to protect persons who, with their eyes open, chose knowingly to enter into even somewhat extortionate bargains, but that it was only when a person had entered into such a bargain in ignorance of the unfair nature of the transaction, advantage having been taken of youth, ignorance, or credulity that a Court of equity was justified in interfering. For a number of relevant decisions see *Penalty* under Section 74, *post*.

In *Srimati Kamini Soondari v. Kali Prosunno*, (1885) 12 I.A. 215, and *Rajah Mokham Singh v. Rajah Rup Singh*, (1893) 20 I.A. 127, the Privy Council, earlier, granted equitable relief by cutting down the rate of interest without any finding express or implied that the agreement was brought about by undue influence. These decisions established that though an agreement is valid so far as the Contract Act is concerned, though there is neither fraud nor undue influence, it will not be enforced if such as will be relieved against in a Court of equity.¹ When a bargain is unconscionable the Court as the Court of equity may give the necessary relief even though the bargain may be deemed a valid contract under the Indian Contract Act.² The Court of Appeal in England in *Phonographic Equipment (1958) Ltd. v. Muslu*, [1961] 1 W.L.R. 1379 C.A., has rightly observed that the Court is slow to interfere with bargains entered into freely and without pressure, and that where the bargain is not harsh and unconscionable the Court will allow to stand it. In a large number of cases it has been held that the question of unconscionableness of a transaction comes for consideration only when it is determined that the relationship between the parties is such that one is in a position to dominate the will of the other and not otherwise.³ Urgent need in itself is not sufficient to render the Section applicable.⁴ An urgent need of money on the part of the borrower does not of itself place the lender in a position to "dominate his will" within the meaning of Section 16.⁵ It will be remembered however that the scope of Section 16 is indeed large.

1. See *Beynon v. Cook*, (1875) L.R. 10 Ch. 389, 391.

2. *Kirparam v. Sami-ud-Din*, 25 All. 285; *Balkishan v. Madan Lal*, (1907) 29 All. 303; *Bouwang Raja v. Banga Behari*, (1915-16) 20 C.W.N. 408; *Abdul Majeed v. Khirode Chandra*, (1915) 42 Cal. 690; *Najaf Ali v. Fazal Ali*, (1928) 26 All L.J. 210.

3. *Haripada v. Jagai Shao*, A.I.R. 1934 Cal. 511; *Syed Noor v. Qutbuddin*, A.I.R. 1956 Hyderabad 114; *Kesavulu v. Aarithulai*, (1913) 36 Mad. 533; *Sundarambal v. Tagavanagurukkal*, (1915) 38 Mad. 850; 23 I.C. 72; *Dhanipal v. Maneshar*, 28 All. 570; (1906) 33 I.A. 118; *Poosathurai v. Kannappa*, 43 Mad. 456; (1919) 47 I.A. 1; *Reshmi v. Ghungaria*, A.I.R. 1952 H.P. 16; *Thakurji v. Ram Dei*, (1930) 123 I.C. 175; A.I.R. 1932 P.C. 139.

4. *Ramalingam v. Subramania*, (1927) 50 Mad. 614; 103 I.C. 394; A.I.R. 1927 Mad. 620; *Risal Singh v. Manohar*, (1927) 102 I.C. 283; *Umesh Chandra v. Golaplal*, (1903) 31 Cal. 233; *Bhut Nath v. Rama Nath*, (1921) 48 Cal. 93; 57 I.C. 1004; *Ganesh v. Vishnu*, (1907) 32 Bom. 37; *Chattring v. Whitchurch*, (1907) 32 Bom. 208; *Debi Sahai v. Ganga Sahai*, (1910) 32 All 589; *Meghraj v. Ganga Bukhsh*, (1910) 7 All. L.J. 729; 7 I.C. 286.

5. *Sundar Koer v. Sham Krishen*, (1907) 34 Cal. 150 P.C.

An agreement for an excessive amount of remuneration for the services of a *mukhtar* or manager by a poor woman¹ or old man² was held as not enforceable. Similar is the case between the managing clerk in an attorney's office and a client.³ In case of an unconscionable bargain, a member of a cultural centre was held to have exercised undue influence over another member who was the other party to such bargain.⁴ What is unconscionable is, again, a matter of construction.⁵

The Fifth Indian Law Commission in its Report on the Indian Contract Act, 1872, observes.⁶

"There are some cases in which on principles of equity, relief has been given against a hard and unconscionable bargain, even though there was no question of undue influence involved. We favour the view taken in *Kesavulu v. Arithulai Ammal*, that unless undue influence is proved, no relief can be given on the ground of unconscionableness of a contract."

In support of the above observation of the Fifth Indian Law Commission it may be said that a contrary view will tend to require that a promise and the consideration therefor must be equivalent. It has been accepted as a principle that there must be only some sufficient consideration, in the eye of law, in order to render an agreement enforceable; and sufficiency in the context does not mean adequacy. Freedom of contract has been and should be left unfettered to a limited extent. It will also be noted that Section 25 in Explanation 2 expressly lays down that an agreement to which the consent of the promisor is freely given will not be void merely because the consideration is inadequate. The Section also safeguards the interests of the promisor in that an inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given. The Court will examine the nature of an unconscionable bargain from this angle irrespective of the fact whether the parties stand in a fiduciary relation to each other or not. Moreover, so far as loans are concerned the modern State in its parental responsibility has done away with the policy of *laissez-faire* in the matter of realisation of the maximum amount between the creditor and the debtor. The rate of interest emerging as the resultant of demand and supply in the money market or in a particular fact-situation obtaining between borrower and lender, *inter se*, is thus no longer allowed to have a free play. The Usurious Loans Act, 1918, gives power to Courts to deal in certain cases with usurious loans of money or in kind. In addition, there are State legislations disallowing any excessive rate of interest or any excessive amount in favour of the lender. Any much reference to the leading cases on unconscionable rates of interest in transactions of loan has become obviously irrelevant.

1. *Pushong v. Mania Halwani*, (1868) 1 B.L.R.A.C. 95.
2. *Ram Kalap v. Bansidhar*, 227 I.C. 9 : A.I.R. 1947 Oudh 89.
3. *Harivalabhdas v. Bhai Jivanji*, (1902) 26 Bom. 689.
4. *Tufton v. Sporni*, (1952) 2 T.L.R. 516.
5. *Nabo Kumar v. Abdul*, (1916-17) 21 C.W.N. 112.
6. Thirteenth Report, page 21, para. 41.

It will be submitted that Section 16 as well as Explanation 2 to Section 25, referred to above, furnish a *via media* between the two extreme views as to the jurisdiction of the Court in its interfering with contract freely entered into by the parties.

English equity and undue influence.—Undue influence is an aspect of fraud. In undue influence, as in all equitable fraud, one party stands in such a relation towards the other that it behoves him to reach a high standard of behaviour or lose the countenance of equity. If the first party falls short of this standard, equity will facilitate the revocation by the second party of a benefit conferred by him on the first. See Hanbury, *Modern Equity*, p. 655.

There are cases of special confidential relationships in which the presumption of undue influence clearly arises.¹ There are, again, cases in which there is no such special relationship. Special circumstances, again, tend to bring cases belonging under the first category within the second category.² Certain circumstances can give rise to a relationship between two parties which makes it the duty of one party to take care of the other, and that includes the duty of giving advice. Psychological considerations enter into the matter and the nature of the circumstance determines the question of presumption of undue influence and the onus of proving it. In the first category of cases, the degree of inquisition is as much severe in transactions *inter vivos* as in wills. In the second category of cases, the degree of inquisition is less severe in wills than in transactions *inter vivos*. For the earlier view, and cases, see Hanbury, 655, and note 88. See also *Wintle v. Nye*, [1959] 1 W.L.R. 284, H.L. (E.), (a case of will). See also *Barry v. Butlin*, (1838) 2 Moo. P.C.C. 480, 482; Mews' Digest, xxi, 845.

Other relationships.—There is no presumption of undue influence in a case where the relationship is one of husband and wife.³ In India, however, in view of the peculiar social conditions, the presumption may arise even in the case of husband and wife.

Onus to be discharged by donee.—In cases of special confidential relationship, giving rise to the presumption of undue influence, to make his equitable title complete, the donee has to rebut the presumption that he unduly influenced the donor. The donee has to show that the donor had independent advice and that the confidential relationship between the

1. *Wright v. Carter*, [1903] 1 Ch. 27 (solicitor and client); *Demerara Bauxite & Co. v. Hubbard*, [1923] A.C. 627 (solicitor and client); *Powell v. Powell*, [1900] 1 Ch. 243 (parent and child); see *Bullock v. Lloyds Bank Ltd.*, [1955] Ch. 317 (father and child); *Lancashire Loans v. Black*, [1934] 1 K.B. 380 (parent and child); *Dent v. Bennett*, (1839) 4 My. & Cr. 269 (physician and patient); *Hatch v. Hatch*, (1804) 9 Ves. 292 (guardian and ward); *Cobbett v. Brock*, (1855) 20 Beav. 524 (engaged couple); *Huguenin v. Basely*, (1807) 14 Ves. 273 (widow and clergyman and his family); *Allcard v. Skinner* (1887), 36 Ch. D. 145.

2. *Antony v. Weerasekera*, [1953] 1 W.L.R. 1007 P.C.

3. *Barron v. Wills*, [1899] 2 Ch. 578; *Bank of Africa v. Cohen*, [1909] 2 Ch. 129, 135; *Howes v. Bishop*, [1909] 2 K.B. 390; *Zamet v. Hyman*, [1961] 1 W.L.R. 1442 C.A. (engaged couple); *Narayana v. Narasimha*, A.I.R. 1965 Ker. 189 (grandfather and grandchild).

parties had ceased at the time of gift.¹ There is the absolute necessity on the part of the donee to show that independent advice had been received by the donor.² Where the confidential relation had ceased at the time of the gift, the necessity of showing the receipt of independent advice by the donor would not be there on the part of the donee.³ Where the confidential relation is still subsisting, proof of independent advice is only one of the methods by which the presumption can be rebutted.⁴ According to Dr. Hanbury, *Modern Equity*, page 658, in general, in cases of special confidential relationships in which the presumption of undue influence clearly arises, the donee can rebut the presumption of undue influence by showing either that the relation has ceased, or, if it is still subsisting that the donor had independent advice. The advice must be independent. It will not be independent where the solicitor giving the advice is also acting for the donee and his friends,⁵ or is also acting for the money-lender, whose claims a mother is proposing to satisfy with the aid of her daughter's reversionary interest.⁶ Unless, again, the adviser is in possession of all the facts, the advice will not be truly advice.⁷

As we have seen above, it is not every fiduciary relation to which the presumption of undue influence applies.⁸ To quote *Hanbury*, pages 658-659, there are, however, cases of fiduciary relationship where one party can show that the other has used some situation, or set of circumstances, in order to induce him to enter into some transaction into which he would not, on his own unfettered judgment, have entered.

In *Morley v. Loughnan*, [1893] 1 Ch. 736, Morley's executors succeeded in recovering his fortune from Loughnan on the ground that it had been obtained by undue influence under the guise of religion. In *Lyon v. Home*, (1868) L.R. 6 Eq. 655: *Mews' Digest*, v. 631, a scoundrel had received large sums of money from a credulous old lady, by means of pretended supernatural powers. In *Tufton v. Sporni*, [1952] 2 T.L.R. 516: [1952] 1 W.N. 439 C.A. an engineer had, under the cloak of religion, realised a personal gain from a young enthusiastic convert to Islam, over whom he had gained a large moral ascendancy. The Court proceeded to examine the evidence at length to see whether such a relation had existed between plaintiff and the defendant and came to the conclusion that it had, and that this relation had been abused by the defendant. The appeal was allowed.

In *In re Coomber. Coomber v. Coomber*, (1911) 1 Ch. 723 C.A., it was observed that it is not every fiduciary relation between a donor and donee which will induce a Court of equity to set aside a gift, but only those special relations

1. *Allcard v. Skinner* (1887) 36 Ch. D. 145, 184, (Lindley, L.J. at p. 184).

2. *Rhodes v. Bate*, (1866) L.R. 1 Ch. 252 (*per* Turner, L.J.): *Mews' Digest*, v. 630.

3. *Mitchell v. Homfray*, (1881) 8 Q.B.D. 587, 591 (*per* Lord Selbourne at p. 591).

4. *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127 (*per* Lord Hailsham at p. 135).

Morley v. Loughnan, [1893] 1 Ch. 736 (*per* Wright J. at p. 752.).

5. *Powel v. Powell*, [1900] 1 Ch. 243.

6. *Lanchashire Loans v. Black*, [1934] 1 K.B. 380.

7. *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127.

8. *In re Coomber*, [1911] 1 Ch. 723, 726, 727 (*Cozens-Hardy, M.R.*).

which from their nature raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it; he need not advise him to do it or not to do it.

In *In re Coomber*, [1911] 1 Ch. 723, the mother could not prove any improper dealing on her son's part and could not obtain cancellation of the assignment. In *Williams v. Bayley*, (1866) L.R. 1 H.L. 200; *Mews' Digest*, v, 884, a banker had frightened the mortgagor to execute the mortgage in his favour on a warning that he had it in his power to prosecute the mortgagor's son for forgery. The mortgage could be rescinded. The arrangement was invalid as it amounted to an agreement to satiate a prosecution.

In *Bullock v. Lloyds Bank Ltd.*, [1955] 1 Ch. 317, it was observed that the doctrine of undue influence is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing greater experience and also such force as that which is inherent in such a relation, for example, as that between a father and his own child.

Bargains with expectant heirs.—An expectant heir is one who has an assured reversionary interest in a family property or even any reasonable hope of a testamentary benefit from it.¹ The burden of proof in cases where reversionary property has been sold at an under-value, and also under circumstances that show that one party has taken advantage of his own knowledge and the other party's ignorance² falls on the stronger party.³ In the case of a post-obit bond, a heavy onus lies on the creditor to show that the agreement contained in such a bond is fair, just and reasonable. On his failure to prove a fair deal, he will get only his principal and reasonable interest thereon. The co-operation of the relative on whose death the expectancy depends may help the money-lender.⁴ A catching bargain, like any other contract procured by fraud, is merely voidable. The expectant heir, after he has entered into his inheritance, by his subsequent acts, may be deemed to have confirmed the transaction.⁵

In *Fry v. Lane. In re Fry Whittet v. Bush*, (1889) 40 Ch. D. 312, it was observed that where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a Court of equity will set aside the transaction. This will be done even in the case of property in possession and *a fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of inde-

1. *Bynion v. Cook*, (1875) L.R. 10 Ch. 389, 391: (*per* Jessel, M.R., at p. 391) *Mews' Digest*, ix, 1198.

2. *Earl of Aylesford v. Morris*, (1873) L.R. 8 Ch. 484 (*per* Lord Selborne L.C. at pp. 490, 491).

3. *Fry v. Lane*, (1888) 40 Ch. D. 312 (Kay, J.). *Earl of Chesterfield v. Janssen*, (1751) 2 Ves. Sen. 125: *Mews' Digest*, i, 416.

4. *O'Rourke v. Bolingbroke*, (1877) 2 App. Cas. 814; *Savery v. King*, [(1856) 5 H.L. Cas. 627. *Earl of Aylesford v. Morris*, (1873) L.R. 8 Ch. 484.

5. *Earl of Chesterfield v. Janssen*, (1751) 2 Ves. Sen. 125: *Mews' Digest*, i, 416.

pendent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving that the purchase was fair, just and reasonable.

Position of money-lenders.—As to England, see the Moneylenders Act, 1927, and other Acts. See also *Samuel v. Newbold*, [1906] A.C. 461; *Nadarajan v. Walauwa*. [1950] A.C. 481; and *Lyle v. Pearson*, [1941] 2 K.B. 391.

Position of bona fide purchaser.—The Court will not rectify against a bona fide purchaser. The right to rescind or rectify against a third person depends entirely on whether the third person gave value, and had no notice of the circumstances giving rise to the equitable right¹

An equitable interest is given priority over a mere equity. Thus an equitable mortgage was given priority over an equity to rectify a lease.²

Effect of laches.—Laches and acquiescence on the part of the donor disentitle him to the right to impeach a transaction on the ground of undue influence. In *Allcard v. Skinner*, (1887) 36 Ch. D. 145 C.A., the plaintiff did not bring her action promptly. She lost her right by reason of her unexplained delay. The equity raised in her favour by the undue influence had lost its force, and the vested rights were not disturbed because of fear of inequity. In the said case the Court of Appeal (*dissentiente* Cotton, L.J.) affirmed the decision of Kekewich, J., and held that under the circumstances the plaintiff's claim was barred by her laches and acquiescence since she left the sisterhood.

17. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance or by his agent with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion, as a fact, of that which is not true by one who does not believe it to be true.

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless

1. *Bell v. Cundall*, (1750) Amb. 101 : Mews' Digest, ix, 876 ; *Babcock v. Lawson*, (1879) 4 Q.B.D. 394 ; *Bainbrigge v. Browne*, (1881) 44 L.T. 705 : Mews' Digest, ix, 1108 ; *De Witte v. Addison*, (1899) 80 L.T. 207 C.A. ; Mews' Digest, ix, 1101 ; *Samuel v. Newbold*, [1906] A.C. 461 H.L. (E).

2. *Garrard v. Franks*, (1862) 30 Beav. 445 : Mews' Digest, xi, 1087 ; xiii, 1389 ; *Phillips v. Phillips*, (1861) 4 De G. F. & J. 208 : Mews' Digest, xx, 1318.

the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) *A* sells by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.

(b) *B* is *A*'s daughter and has just come of age. Here the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.

(c) *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A*'s silence is equivalent to speech.

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

Fraud.—Fraud is an act committed by a party to a contract with the intent to deceive the other party or with the intent to fraudulently induce such party to enter into a contract. For the purposes of Section 17 of the Contract Act, in order to constitute a fraud the fraudulent act may be committed by a party in person or with his connivance by some other person or by his agent. The other party may be personally deceived or fraudulently induced to enter into a contract. It will also be a fraud if the agent of such party is deceived or fraudulently induced to enter into a contract.

Fraud may be described as an infraction of the rules of fair dealing.¹ Fraud is something dishonest and morally wrong as distinguished from 'illegality' or 'illegal'.² For the action at the law intention and representation are material. In equity an act or its consequences to the person aggrieved may be of greater importance than the intention of the defendant or any representation made to the plaintiff, and the same may be said of acts which have been stigmatized as fraudulent by statute.

'Fraud' or 'collusion' is secret in its origin and inception, and the means adopted for fraudulent design cannot be proved to the very hilt. It can only be inferred from the circumstances placed before the Court. It has to be borne in mind however that the inference of fraud or collusion is to be drawn only from positive materials on record and it cannot be based merely on speculation and surmises.³ Each circumstance by itself may not mean much but taking all of them together, they may reveal a fraudulent or dishonest plan.⁴

In order to plead fraud effectively the particulars of fraud must be given by the party, and in the absence of such particulars, there cannot be any

1. Wharton : *Law Lexicon*, 14th ed., 1953, 434.

2. Stroud : *Judicial Dictionary*, 3d. edn., vol. 2, 1952, 1158 ; *Ex parte Watson*, 21 Q.B.D. 301 ; *Boyse v. Rossborough*, 6 H.L. Ca. 48 ; *Re Patrick & Lyon, Ltd.*, [1933] Ch. 786 ; *Re Brighton Coal-miners, Ltd.*, (In Liquidation), [1944] N.Z.L.R. 275 ; *Pertab Chunder v. Mohendra nath*, (1890) 17 Cal. 291 P.C.

3. *Passarilal v. Chuttanbai*, A.I.R. 1958 M.P. 417 ; *Arabinda v. Chandra*, A.I.R. 1954 Assam 94.

4. *Thangachi v. Ahmed Hussain*, A.I.R. 1957 Mad. 194.

proper averment of fraud. Even so, the fraud which is alleged must be such as enters into the transaction itself and enables the party to avoid the transaction. It must be fraud within the meaning of the terms as used in Section 17 (3) of the Contract Act.¹

Where one party induces another to contract on the faith of representations made to him any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently.² The presence of the conditions for the application of Section 45 of the Insurance Act, 1938, attracts the operation of Section 17 of the Contract Act.³

Means and includes.—When a statute says that a word or phrase shall mean—not only that it shall include certain things or acts, the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition.⁴

The expression 'includes' generally purports to be enumerative and not exhaustive. It seeks to add to the objects already covered by express definitions or otherwise. 'Shall include' is a phrase of extension, and not of restrictive definition; it is not equivalent to 'shall mean'.

'Include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. But 'include' is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to those words or expressions.⁵

'Include' in some Acts, the English Wills Act, 1837, (7 Wil. 4 and 1 Vict. c. 26), for example, is equivalent in meaning to 'comprise'⁶. In *In re the Will of Jeannie Mcfie*,⁷ the phrase 'means and includes' was held to imply that a definition was exhaustive.

In spite of the accepted connotation of the phrase 'means and includes', the very use of indeterminate expressions in all the five categories in Section 17 for the determination of fraud makes the import of the definition of fraud indeed very wide for the purposes of the Contract Act.

1. *Narsingdas v. Radhakisan*, A.I.R. 1952 Bom. 425.

2. *Pertab Chunder v. Mohendranath*, (1890) 17 Cal. 291 P.C.

3. *Mithoolal v. L. I. Co.*, A.I.R. 1962 S.C. 814.

4. *Per Esher, M.R., Gough v. Gough*, [1891] 2 Q.B. 665; *Bristol Trams Co. v. Bristol*, 59 L.J. Q.B. 449; Stroud: *Judicial Dictionary*, vol. 2, 1952, 1415, 1416, and vol. 3, 1953, 1765; *Darbari Lal v. Dharam Wati*, (F.B.), A.I.R. 1957 All 541.

5. *Per Lord Watson, Dilworth v. Commissioner of Stamps*, [1899] A.C. 105, 106.

6. Sections 24 and 27, 7 Wil. 4 and 1 Vict. c. 26. See also Sections 25 and 26, *ibid*.

7. (1944) St. R.O. 130.

The equitable doctrine of constructive fraud.—Equity goes further than the law. A Court of law regarding itself as a Court of conscience considers a particular conduct in given circumstances as tinged with constructive fraud even though there has been no moral turpitude or any evil design on the part of the party responsible for the impugned conduct.¹ A conduct thus may be regarded as fraudulent even though not based on any moral fraud in the ordinary sense. It is regarded as fraudulent because it involves a breach of the sort of obligation which is supposed to obtain between the parties concerned.² Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.³ The existence of a confidential or fiduciary relation as obtaining between parent and child, guardian and ward, solicitor and client, doctor and patient, religious superior and inferior, trustee and beneficiary, or principal and agent, places on the party benefiting from an unconscionable bargain a burden of proving that the contract was advantageous to the confiding party and that no material fact was concealed from him.⁴ Whenever a party has reposed confidence in the other, such confidence cannot be misused by the latter. There are also cases of contract where by the very nature of the case only one of the parties is in a position to know the material facts and in such case the law requires him to disclose to the other party all the material facts. A contract of insurance has been, for example, taken as a contract requiring abundant good faith (*uberrima fides*), and when an assured⁵ fails to make a full and fair disclosure of all the material facts for the purpose of the contract of insurance the insurer will be entitled to avoid the contract.⁶ Where the contract is *uberrimae fidei* a fact may be, for the purpose of its disclosure, material in the context of the contract in question even though it could not have been so appreciated by the party in possession of its knowledge.⁷ It is his duty to disclose what he knows.⁸ Every fact or circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. It is not material whether

1. *Lancashire Loans, Ltd., v. Black*, [1934] 1 K.B. 380, 402.

2. *Nocton v. Ashburton*, [1914] A.C. 932, 954.

3. *Tate v. Williamson*, (1866), 2 Ch. App. 55, 61.

4. *Moody v. Cox & Hatt*, [1917] 2 Ch. 71, 88; for illustrative cases see *Fiduciary relations*, under Section 16, *supra*.

5. The expression "assured" in the context of an insurance is pronounced *ass-your-ed* in English Courts.

6. *Carter v. Boehm*, (1766) 3 Burr. 1905, 1909.

7. *London Assurance v. Mansel*, (1879), 11 Ch. D. 363.

8. *Joel v. Law Union & Crown Insurance Co.*, [1908] 2 K.B. 863, 884.

any loss has actually resulted from the undisclosed circumstance.¹

In all cases of insurance, whether on ships, houses or lives, the underwriter should be informed of any material circumstance within the knowledge of the assured; and the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held, as the law is, that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within his reach.² The assured thus must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. When however it is not possible for a party to know a fact the law does not impose on him any duty to disclose the said fact. This last commonsense principle of law is however unfortunately sought to be avoided by the insurers by their inserting a term in the contract of insurance to the effect that the policies issued by them will be invalid unless each of the declarations made by the assured has been correctly, and not merely truthfully, made though the insurers are well aware that it is impossible for anyone to arrive at anything more certain than an opinion about it.³ Thus the accuracy of the information given by the assured, rather than the *bona fides* in his giving it, forms a condition of the validity of the policy issued. The Court also in practice requires the insurer to sufficiently prove the inaccuracy of the information provided in order to enable himself to avoid the contract.⁴

In India, too, the well-settled law in the field of insurance is that contracts of insurance including the contracts of life assurance are contracts *uberrimae fidei* and every fact of materiality must be disclosed; otherwise there is good ground for rescission. And this duty to disclose continues up to the conclusion of the contract and covers any material alteration in the character of the risk which may take place between proposal and acceptance. Non-disclosure of material facts even in the absence of misrepresentation or fraud may make the contract voidable at the instance of the party to whom *uberrima fides* are due. In a contract of life assurance any fact which tends to suggest that

1. *Seaman v. Fonereau*, (1743), 2 Stra. 1183; *Bufe v. Turner*, (1815), 6 Taunt. 338; *Kirby v. Smith*, (1818), 1 B. & Ald. 672; *The Teazer, Offor v. Gray*, (1853), 5 L.T. 774; *Uzielli v. Commercial Union Assurance Co.*, (1865), 12 L.T. 399; *Harrower v. Hutchison*, (1870), L.R. 5 Q.B. 584; *Seaton v. Heath*, [1899] 1 Q.B. 782; *Wembley Urban D.C. v. Poor Law & Local Government Officers' Mutual Guarantee Association, Ltd.*, (1901), 65 J.P. 330; *Hood v. West End Motor Car Packing Co.*, [1917] 2 K.B. 38; *Locker & Woolf, Ltd. v. Western Australian Insurance Co. Ltd.*, [1936] 1 K.B. 408.

2. *Lindenau v. Desdorough* (1828), 8 B. and C. 586, 592.

3. *Joel v. Law Union Crown Insurance Company*, [1908] 2 K.B. 863, 885.

4. *Bond Air Services, Ltd. v. Hill*, [1955] 2 Q.B. 417; [1955] 2 All E.R. 476; *West v. National Motor and Accident Insurance Union, Ltd.*, [1955] 1 All E.R. 800.

the life insured is likely to fall short of the average duration is a material fact. Illness or material change in health has thus been distinguished from an ordinary simple disorder. A disorder is not taken as one tending to shorten life even where the assured dies from it. It is always a question of fact whether any particular physical nervous disorder amounts to an illness or is a mere disorder.¹

If any of the statements in the proposal form or the declaration form accompanying the proposal form made by the assured and which have been made the basis of the contract are found to be untrue, the contract of insurance would be void and unenforceable in law, irrespective of the question whether the statement concerned is of a material nature or not.² It will be a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would on a fair consideration of the evidence have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.³

When there was a fraudulent suppression of material facts on the part of the insured which vitiated the contract of insurance, Section 45 of the Insurance Act, 1938, could not help the plaintiff, the widow of the insured.⁴

Where there is evidence that during the relevant period there was a steady rise in the price of motor cars, a person who insures a car would be justified and particularly so if he had made an advantageous bargain when he himself made the purchase, to give as his estimated value of the car a sum in excess of what he himself had paid for its purchase. If he did that, it cannot be said that he was either making a false or incorrect statement.

Where the parties have agreed that the truth of the statements in the proposal shall be foundational to the enforceability of the contract of insurance, the argument that what avoids the contract is only a material inaccuracy which would influence the insurer in determining whether or not to accept the risk or in fixing the amount of the premium would be unavailable.⁵ See also *Contracts uberrimae fidei*, below, at page 365, See also Section 30, *post*.

A person cannot be bound in law by his signature to a document which he does not understand. Thus a mere signature of an insured person who does not understand English, on the proposal forms with a binding declaration in English that if any untrue averments be therein contained all moneys which should be paid up on account of the said assurance would be forfeited and the assurance itself would be absolutely null and void is not enough to

1. *Ratan Lal v. Metropolitan Insurance Co.* A.I.R. 1959 Pat. 413.

2. *Balkrishna v. New Indian Assurance Co.* A.I.R. 1959 Patna 102.

3. *Seethamma v. Bombay Life Assurance Co. Ltd.*, A.I.R. 1954 Mys. 134; *Mutual Life Insurance Co. v. Ontario Metal Products Co.*, [1925] A.C. 344; *Dawsons Bank Ltd. v. Vulcan Insurance Co. Ltd.*, 13 Rang. 63; A.I.R. 1935 P.C. 1.

4. *Seethamma v. Bombay Life Assurance Co., Ltd.*, A.I.R. 1964 Mysore 134; *Shivkumar v. North British & Mercantile Insurance Co.*, 166 I.C. 16; A.I.R. 1936 Sind 222; *Gordon v. Street*, [1899] 2 Q.B. 641.

5. *Srinivasa v. Premier Life etc., Co.* A.I.R. 1958 Mys. 53.

prove his knowledge of what he was signing and to bind him literally and irrevocably to such a contract. The liability of the Company under the contract should be determined on the facts of the case and not on a mere "yes" or "no" recorded in the proposal and declaration forms signed by an assured person and written by someone else.¹ See pages 365, 366, below.

In the case of a contract to take shares in companies the promoters are required to show abundant good faith and candour in the preliminaries to an issue of shares.²

In case of family arrangements, too, equity requires that there should be a full and fair disclosure of all the material facts known to either of the parties; and such disclosure is insisted on irrespective of any inquiry that may or may not have been made.³

Fraudulent suggestion.—When a person suggests something, as a fact, which is not true and which the person suggesting does not also believe to be true, it is an act of fraud. As to fraudulent misrepresentation, see under Section 18, *infra*.

Section 17 read with Section 19 permits a contract to be avoided when based on representations made by one of the parties or his agent when these are known to be false by the person making them, and the illustrations indicate that the principle is meant to extend to contracts which include an element of transfer such as sales or mortgages.⁴

An allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act, which representations were untrue and were known to the defendant to be untrue, is sufficient.⁵

The rule of *caveat emptor* is applicable to sales of immovable property when the vendor has acted *bona fide* and has not been guilty of fraud or misrepresentation and has given no covenant for title in the sale deed. Only where the representation as to title made by the vendor has been made recklessly or with gross negligence he could not escape the charge of fraudulent misrepresentation and the vendee would be entitled to claim consequential remedy by way of damages.⁶

Active concealment of fact.—When a party having knowledge⁷ or belief of a fact actively conceals it he does a fraudulent act. *A* sells by auction to *B* a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. *A* does not actively conceal a fact which he knows or believes to be a fact. There is no fraud on the part of *A*. If *B* said to *A*—"If you do not deny it, I shall assume that the horse is sound," and *A* said nothing, his silence would be equivalent to speech, that is, active conceal-

1. *Kulla Amthal v. Oriental Govt. Security Life Assurance Co. Ltd.*, A.I.R. 1954 Mad. 636.

2. *Central Rly. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, 113.

3. *Gordon v. Gordon* (1821), 3 Swan. 480; *Greenwood v. Greenwood* (1863), 2 De G.J. & Sm. 28.

4. *Elizabeth Baines v. Ram Sahai*, A.I.R. 1940 Lah. 505.

5. *Davy v. Garrett*, 7 Ch. D. 489.

6. *Abdulla v. Krishnan*, A.I.R. 1958 Kerala 322.

7. *Bappu Rawther v. State of Kerala*, A.I.R. 1964 Ker. 109.

ment of a fact. *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which if known to *B* would affect his willingness to proceed with the contract. *A* is not bound in law to inform *B*. His concealment of the fact of change in prices is not a case of active concealment of fact. In case of fiduciary relationship, however, the law would impose some equitable burden on the party in whom trust or confidence is reposed. In the case of the sale of the horse, if *B* were *A*'s daughter, for example, and she at the time of the purchase had just come of age, the very relation between the parties would make it *A*'s duty to tell *B* if the horse was unsound. In view of the circumstances of the case, *A*'s silence would be tantamount to active concealment of the fact of unsoundness of the horse. An active concealment will not protect a vendor even when it has been stipulated that the vendor will not be liable for defective title.¹

The Explanation to Section 17 makes it clear that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. As to the various aspects of misrepresentation *see* under Section 18, *infra*.

The Exception to Section 19, again, makes it clear that where consent to a contract has been obtained by misrepresentation or silence, even though such silence is fraudulent within the meaning of Section 17, the contract will not be voidable at the instance of the party defrauded if such party had had the means of discovering the truth with ordinary diligence.

Promise not intended to be performed.—Where a promisor makes a promise but does not intend to perform it, it will be an act of fraud in the eye of the law, and any contract of which such promise is a part is voidable at the option of the party defrauded. When a promise has been made by a person without any intention on his part of performing it and by such promise he has induced another to enter into a contract the contract will be voidable at the option of the other party under Section 19 on the ground of fraud.

Where the petitioner and the respondent went through a ceremony of marriage without any intention on the part of the husband respondent to regard it as a real marriage, the consent of the petitioner was held as obtained by fraud and the marriage, consequently, a mere pretence and therefore null and void.² In case of misrepresentation amounting to fraud the marriage will be set aside when induced by such misrepresentation.³

Any deceiving act.—When a person by an act fitted to deceive another has induced the latter to enter into a contract with him the contract is vitiated with fraud and can be avoided under Section 19 at the option of the person defrauded.

1. *Akhtar Jahan v. Hazari Lal*, (1927) 25 All. L.J. 708: 103 I.C. 310: A.I.R. 1927 All. 693.

2. *Shireen v. John*, A.I.R. 1952 Punjab 277.

3. *Bimla Bai v. Shankarlal*, A.I.R. 1959 M.P. 8.

Earlier, we have seen that though the expression "means and includes" in Section 17, seeks to make the definition of 'fraud' exhaustive, the use of indeterminate expressions like "any other act fitted to deceive" in the Section practically renders the scope of the Section very very wide. When an Act in a Section seeks to give statutory recognition to some equitable principle, it is not inadvisable to make use of indeterminate expressions.

Section 216 imposes something in the nature of a penalty upon an agent who acts improperly by converting himself into a principal without making due disclosure and the operation of the Section does not necessarily depend in any way upon the principal having suffered in any manner. This is so because an agent holds a fiduciary position and acting in that capacity, he makes a profit without disclosing his interests to those persons towards whom he stands in such a position. He must, therefore, account to them for the profit which he makes.¹

An act or omission declared by law to be fraudulent.—When by some statutory provision an act or omission has been declared as fraudulent and a person by such act or omission has induced another to enter into a contract with him, the contract is vitiated with fraud, and under Section 19 it is voidable at the option of the person defrauded.

Section 55 of the Transfer of Property Act, 1882, imposes some duties on the vendor and the purchaser of a property. Any omission of the statutory duties thus imposed will be tantamount to fraud, and a contract entered into on the basis of an act or omission specially declared to be fraudulent by the Transfer of Property Act will be, consequently, voidable at the option of the party defrauded. An active concealment will not save the vendor or purchaser from the liabilities in spite of a stipulation to the contrary.²

A man may give in India by will property or its income to a donee with a condition that the donee's interest will cease on bankruptcy and the property will in that event go to another; if insolvency supervenes, the property will not vest in the Official Receiver. If there is no gift over on the cesser of the donee's interest, the property will revert to the donee and will vest in the Official Receiver on the donee's insolvency. But a person cannot enter into any arrangement or agreement by which his own title will cease in the event of bankruptcy, for it would then be a fraud perpetrated on the insolvency law.³

English equity and fraud.—Fraud postulates the influence on one party of some action or word on the part of the other. The outcome of fraud is to cause mistake. Honesty in the stricter sense is, by English law, a duty of

1. *Giribala v. Ushangini*, A.I.R. 1955 Assam 177.

2. *Akhtar Jahan v. Hazari Lal*, (1927) 25 All. L.J. 708 : 103 I.C. 310 : A.I.R. 1927 All. 693. For fraudulent transfers under Transfer of Property Act, see Section 53, *ibid.* ; see also Sections 54 and 56 respectively of the Provincial Insolvency Act, 1920, and the Presidency Towns Insolvency Act, 1909.

3. *Muktal v. Trustees of Provident Fund*, A.I.R. 1956 S.C. 336 ; *Wilson v. Greenwood*, (1918) 36 E.R. 469.

universal obligation. This obligation exists independently of contract or of special obligation.¹

An action in tort will not lie against a man for a statement made by him unless he has either deliberately spoken what he knows to be untrue, or has spoken recklessly, without caring whether his statements were true or false.²

In *Derry v. Peek* (1889), 14 A.C. 337 H.L.(E.), it was observed that in an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shewn that false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit.

In *Candler v. Crane Christmas & Co.*, [1951] 2 K.B. 164 C.A. : [1951] 1 All E.R. 426 C.A. it was held (Denning, L.J. *dissentiente*) that in the absence of contractual or fiduciary relationship between the parties, the defendants, a firm of accountants and auditors, owed no duty to the plaintiff to exercise care in preparing the accounts and giving their certificate, and the plaintiff, therefore, could not maintain against them an action for negligence.

No damages can be obtained for an innocent misrepresentation. In *Collen v. Wright*, 8 E. & B. 647 : *Mews' Digest*, ix, 1274; xvi, 297, 304 : 27 L.J., Q. B. 215, it was held that in the instant case the third party might, in an action against the agent on the implied warranty of authority, recover as damages his costs of the chancery suit.

The case of *Oscar Chess, Ltd. v. Williams*, [1957] 1 W.L.R. 370 : [1957] 1 All E.R. 325 C.A., contains a full discussion of the question whether a representation is to be regarded as a warranty or not. It was a case only of an innocent misrepresentation which gave no right to damages. If the purchaser had acted promptly, he might have set the contract aside on the ground of mistake (at pages 327 and 330 *per* Denning, L.J.). If the representation had been fraudulent, it would have been actionable.

In *Curtis v. Chemical Cleaning & Dyeing Co., Ltd.*, [1951] 1 All E.R. 631, at pages 634, *et seq.*, Denning, L.J. observed that any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption (in the instant case). If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. A representation might be literally true but practically false, not because of what it says, but because of what it leaves unsaid. In short, because of what it implies. When one

1. *Per* Viscount Haldane, L.C., in *Nocton v. Lord Ashburton*, [1914] A.C. 932, 954 H.L.(E.)¹ for extension of fraud to real right.

2. *Derry v. Peek* (1889), 14 App. Cas. 337.

party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate, not so wide an exemption as that which is in fact contained in the document.

Fraud rendered a contract voidable at common law. That is to say, where a party had been induced to enter into the contract by a fraudulent representation of the other party, the first party could repudiate the contract. Where the representation fell short of fraud, the first party could not repudiate the contract unless he could show that the representation was not only material, but fundamental.¹

Where a representation though not actually incorporated in the contract, was nevertheless so vital to it that a party would not have entered into the contract at all had he known the representation was inaccurate, the representation would be then regarded as a condition. Its breach would render the contract in question voidable in favour of the party who relied on its accuracy.²

Where the representation amounted to an independent promise, but collateral to the main contract, then it would be regarded as a warranty, and the breach of it would entitle the party who relied on it, not to repudiate the whole contract, but to sue for damages.³

In *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394 H.L.(E.), the appellants were entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to the other parties (a case of resale by purchaser).

In *Andrews Brothers, Ltd., v. Singer & Co.*, [1934] 1 K.B. 17 C.A., it was observed that the term "new Singer car" was an express and not an implied term of the contract; and hence there was breach of contract for its non-delivery.

In *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K.B. 394, as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the term of the contract and it was wholly immaterial that she had not read it and did not know its contents. In *Curtis v. Chemical Cleaning & Dyeing Co., Ltd.*, [1951] 1 K.B. 805: [1951] 1 All E.R. 631, it was held that since the plaintiff had been induced to sign the document by an innocent misrepresentation as to the extent of the exception clause, the exception never became part of the contract between the parties, and, therefore, the defendants were liable to the plaintiff.

As to the distinction between fraud and deceit, if any, see *Hanbury, op. cit.*, pages 643-646.

1. *Kennedy v. Panama, New Zealand & Australian Royal Mail Co.* (1867) L.R. 2 Q.B. 580 (per Blackburn, J.): *Mews' Digest*, iv, 137; ix, 1208, 1215.

2. *Bannerman v. White* (1861) 10 C.B.N.S. 844: *Mews' Digest*, xvii, 296; *Akerhielm v. De Mars* [1959] A.C. 789 P.C. (per Lord Jenkins at page 805).

3. *Russell v. Nicolopulo* (1860) 8 C.B.N.S. 362: *Mews' Digest*, xvii, 304.

The difference between innocent and fraudulent misrepresentation is not vital in equity. If however the misrepresentation is innocent, equity will not order cancellation of a contract unless the parties can be restored to their previous position. The cancellation of an executed lease was refused.¹ Where the misrepresentation was wilful, relief would be granted even though the parties had changed their position.²

Rectification.—Rectification is never asked for in cases of pure fraud. It can be asked for in cases where fraud had led to mistake.

Where the agent misleads the purchaser by making untrue though unauthorised statements about the property, the vendor cannot compel specific performance.³

Misdescription in contracts of sale.—Cancellation will not be granted on account of a statement of opinion. In *Johnson v. Smart* (1860), 2 Giff. 151: Mews' Digest, xi, 960; xx, 1069, there was no misstatement of fact, and the adjectives describing the property related only to matters of opinion. The purchaser was ordered to complete the contract.

In *Scott v. Hanson* (1826), 1 Sim. 13: (1829) 1 Russ. & My. 128: Mews' Digest, xx, 1065, there had been no material misrepresentation. The words of the auctioneer were taken as nothing more than the loose opinion of his. In *Bisset v. Wilkinson*, [1927] A.C. 177, the purchaser's claim to rescind was not allowed because the vendor's words came within the category of statement of an opinion which he honestly held and not of misstatement of fact.

In *Smith v. Land & House Property Corporation* (1884), 28 Ch. D. 7, the words of the vendor were taken as an expression of fact and not of mere opinion. The purchaser was entitled to cancellation of the agreement.

In *Brown v. Raphael*, [1958] Ch. 636, the purchaser was held entitled to rescind because of misrepresentation, though innocent, by solicitors of the vendor, which misrepresentation had a vital significance in the matter.

A representation of fact may be inherent in a statement of opinion, and, at any rate, the existence of the opinion in the person stating it is a question of fact.⁴

In *Trower v. Newcome* (1813), 3 Mer. 704: 17 R.R. 141: Mews' Digest, xiv, 324; xx, 1047, specific performance was decreed against a purchaser at an auction who had bought land vaguely described without troubling to make any investigations. The representation in the particulars of sale (complained

1. *Angel v. Jay* [1911] 1 K.B. 666.

2. *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218 (per Lord Blackburn at p. 1278); *Edler v. Auerbach* [1949] 2 All E.R. 692; see however *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326; *Armstrong v. Jackson* [1917] 2 K.B. 822; *Lever v. Bell* [1931] 1 K.B. 557 (per Scrutton, L.J. at p. 588); *Solle v. Butcher* [1950] 1 K.B. 671; *Leaf v. International Galleries* [1950] 2 K.B. 86. (See also *Hanbury*, page 647 and note 46).

3. *Mullens v. Miller* (1882) 22 Ch. D. 194.

4. *Bisset v. Wilkinson* [1927] A.C. 177 (Per Lord Merrivale at p. 182); *Dyer v. Hargrave* (1805) 10 Ves. 505: Mews' Digest, xx, 1241, 1276, 1294.

of as calculated to mislead) was so vague and indefinite that it ought to have put the purchaser on making previous inquiry. So specific performance was decreed against the purchaser at the public auction (*per* Grant, M.R.). In *Clarke v. Mackintosh* (1862), 4 Giff. 134: Mews' Digest, xix, 603, it was observed that where the purchaser investigates and inquires for himself and has a fair opportunity of testing the accuracy of the representation made by the vendor, the vendor is relieved from responsibility. In *Lord Brooke v. Rounthwaite* (1846), 5 Hare 298, 304: Mews' Digest, xx, 1296, a definite representation affected the value of the subject of sale, and the purchaser was allowed to resist specific performance.

The representation to be relevant must not only be material but also must have been acted upon. The materiality of the representation is as pertinent as the reliance placed on it. They must go together in order to entitle a party to equitable relief. In *Fellowes v. Lord Gwydyr* (1829), 1 Russ. & My. 83: Mews' Digest, ix, 1059; xix, 607, Page could not resist specific performance because the representation as to the personality of the contractee was not material.

In *Smith v. Wheatcroft* (1878), 9 Ch. D. 223, Fry, J., observed that where personal considerations enter into a contract, error as to the person with whom the contract is made annuls the contract; not so where the person sought to be bound would have been equally willing to make the same contract with any other person. In the same case the same learned Judge held that the plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the defendant, the action would not be dismissed, but judgment would be given for specific performance with the variation.

Where a party has taken steps to verify the representations made to him, the court will conclude that such representations had not been material in the matter of the formation of the contract¹, and specific performance will be accordingly decreed. As against this, there is the statement of Jessel, M.R., in *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 14, that the effect of a false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

The fact of material misrepresentation having been made with the object of inducing a man to enter into a contract raises an inference of law that he was actually induced by it. In *With v. O'Flanagan*, [1936] Ch. 575, a representation true when it was made became untrue, owing to a change of circumstances, before the contract was signed. The plaintiff was entitled to rescission on the ground that the representation had to be treated as continuing till the date when the contract was signed.

Where concealment amounts to fraud.—Mere nondisclosure, by itself,

1. *Clapham v. Shillito* (1844) 7 Beav. 146: Mews' Digest, ix, 1051, 1064; *Clarke v. Mackintosh* (1862) 4 Giff. 134: Mews' Digest, xix, 607.

gives rise to no action at common law except in contracts *uberrimae fidei*. It is however a ground for equitable remedies.¹

In common law, in order to render concealment into a fraud, there must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false.²

In *Renell v. Sprye* (1852), 1 De G.M.&G. 660: Mews' Digest, iii, 1025, etc.; 21 L.J., Ch. 633, it was observed that an agreement though not amounting strictly to champerty or maintenance, a court of equity will discourage and relieve against.

A vendor of land must describe the land accurately.³ He should disclose every material defect in his title unless by a special condition he is relieved of the obligation. Where the defect was ostensible specific performance could not be resisted.⁴

In *Shirley v. Stratton* (1785), 1 Bro. C.C. 440: Mews' Digest, ix, 1067; xix, 608, the vendor industriously concealed the defect, and specific performance was refused. What facts a party is under an obligation to disclose will depend on the particular fact-situation.⁵ Mere silence has been differentiated from active concealment.⁶

In *Turner v. Green*, [1895] 2 Ch. 205, Chitty, J., observed that where there was no obligation on plaintiff's solicitor to disclose all he knew, the defendant was bound by the terms of the settlement. His lordship also held that mere silence as regards a material fact, which the one party is not bound to disclose to the other, is not a ground for rescission, or a defence to specific performance.

Contracts *uberrimae fidei*.—In contracts *uberrimae fidei*, full disclosure of every material fact is required. All contracts of insurance are contracts *uberrimae fidei*. All contracts of insurance are not of indemnity.⁷ Concealment of matters which are in fact material will vitiate a policy, though the party did not believe them to be material.⁸ In *London Assurance v. Mansel* (1879), 11 Ch. D. 363, Mansel had been guilty of a material concealment and the plaintiff office was entitled to have the contract set aside (*per* Jessel, M.R.). In *Locker & Woolf Ltd v. Western Australian Insurance Co. Ltd.*, [1936] 1 K.B.

1. *Hesse v. Briant* (1856) 6 De G.M. & G. 623: Mews' Digest, xix, 109, 608; xx, 1042; *Owen v. Foulks* (1802) 6 Ves. 631 n; 9 Ves. 348 S.P.; Mews' Digest, XX 1355.

2. *Peak v. Gurney* (1873) L.R. 6 H.L. 377 (*per* Lord Cairns at p. 403): Mew 'Digest, i, 531; iv, 112, 117, 130, etc.

3. *Swaisland v. Dearsley* (1861) 29 Beav. 430: Mews' Digest, ix, 594; xx, 1047.

4. *Bowles v. Round* (1800) 5 Ves. 508; Mews' Digest, i, 1285; xx, 1067.

5. *Turner v. Green* [1895] 2 Ch. 205, 209 (*per* Chitty, J.); *Bell v. Lever* [1932] A.C. 161; *Greenhalgh v. Brindley* [1901] 2 Ch. 324; see also *Hanbury*, p. 652 and note 75.

6. *Turner v. Green* [1895] 2 Ch. 205, (*per* Chitty, J. at p. 209).

7. *Dalby v. India and London Life Assurance Co.* (1854) 15 C.B. 365; Mews' Digest, xi, 3; *Law v. London Indisputable Life Policy Co.* (1865) 1 K. & J. 223: Mews' Digest, xi, 18.

8. *Dalglish v. Jarvie* 2 Mac. & C 231, 243; Mews' Digest, v, 1343, 1346; 20 L.J. Ch. 475; 14 Jur. 945 (designs ornamenting manufactures); *Brownlie v. Campbell* (1880) 5 App. Cas. 925 H.L. (Sc.) (*per* Lord Blackburn, at p. 954) (solicitor's responsibility).

408 C.A., it was observed by Slessor, L.J., at p. 414, that it was fundamental in insurance law that the company was entitled to be satisfied as to the moral hazard. The moral integrity of the proposer is called the moral hazard. The non-disclosure of the refusal of the motorcar insurance was the non-disclosure of a material fact in the proposal for the fire insurance which therefore entitled the fire insurance company to avoid the policy. *See also The equitable doctrine of constructive fraud, above. See also under Section 30, post.*

Effect of delay.—Delay may disentitle the victim of equitable fraud to relief.¹ In *Leaf v. International Galleries*, [1950] 2 K.B. 86, rescission was forfeited by delay. In *Long v. Lloyd*, [1958] 1 W.L.R. 753 C.A., acquiescence deprived the purchaser of any right to rescind the purchase. Where a seller of goods has a right to avoid the contract for fraud, he sufficiently exercises his election if he at once, on discovering the fraud, takes all possible steps to regain the goods, even though he cannot find the rogue or communicate with him.² Mere delay in payment of money due does not constitute fraud.³

Fraud creates personal bar.—A party may, by his conduct in a certain situation, raise up against himself a personal bar.⁴

18. "Misrepresentation" means and includes:—

"Misrepresentation" (1) the positive assertion, in a manner not defined, warranted by the information of the person making it, of that which is not true, though he believes it to be true.

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one, claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him.

(3) causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Representation.—A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract.⁵ One may however represent a state of things without making a direct communication thereon to the person affected thereby. Where, for example, a vendor of coals affixed a metal label to a sack of coal indicating

1. *Lamare v. Dixon* (1873) L.R. : 6 H.L. 414 : Mews' Digest, xi, 963.

2. *Car Finance Co. v. Caldwell* [1963] 2 All E.R. 547 Q.B.D.

3. *Kapila Textile Mills, Ltd. v. Madhava & Co.* A.I.R. 1963 Mys. 39.

4. *Viscount Clermont v. Tasburgh* (1819) 1 Jac. & W. 112 : Mews' Digest, xix, 603 ; *Wauton v. Coppord* [1899] 1 Ch. 92 ; *Lamare v. Dixon* (1873) L.R. 6 H.L. 414 : Mews' Digest, xi, 963.

5. *Lamare v. Dixon*, (1873) L.R. 6 H.L. 414 ; *Redgrave v. Hurd*, (1881), 20 Ch D. 1 ; *Whittington v. Seal-Hayne*, (1900), 82 L.T. 49.

that when full the sack contained $\frac{1}{2}$ cwt., it was held that he thereby represented that it did contain that weight.¹ The representation must be by the seller himself² or by an agent in the course of his employ.³

Representation is any indication by words, letters, signs, or conduct by one person to another of the existence of a fact. A representation of simple commendation or expectation at or before a contract of which the other party can or should form his own opinion is not as a rule actionable; 'an innocent misrepresentation gives no ground for damages', but this involves the question whether the misrepresentation is innocent. If made at the time of sale of personal chattels 'it is a warranty' or collateral contract provided it appears to have been so intended. Even though a representation might not amount to fraud, or a warranty, its untruth might be a ground for resisting specific performance.⁴ See also above.

A representation of fact is distinguished from a representation of law.⁵ There is also a clear difference between a representation of fact and a representation that something will be done in the future. A representation that something will be done in the future cannot either be true or false at the moment it is made. Such a representation can at best be a contract or promise.⁶

The expression of an opinion is not, *per se*, a representation of fact. But an expression of opinion may involve a representation of fact. The existence of the opinion in the person stating it is a question of fact.⁷

A statement of opinion may also sometimes involve a statement of fact. Thus, in a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion.⁸ When however the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justifies his opinion.⁹ Where, again, an opinion is stated as a fact it will be tantamount to a representation in the eye of the law.¹⁰ Mere statements of parties as made by the sellers as to the quality of a thing do not form a part of the contract as ultimately reached and as such are not taken as representations at law.¹¹ If however such statements seek to give to

1. *Franklin v. Godfrey*, 63 L.J. M.C. 239.

2. *Roberts v. Woodward*, 25 Q.B.D. 412.

3. *Baker v. Herd*, 10 T.L.R. 181; Stroud: *Judicial Dictionary*, vol. 3, 2554.

4. Wharton: *Law Lexicon*, 869; *Pertab Chunder v. Mohendranath*, (1890) 17 Cal. 291 P.C.

5. *Beattie v. Ebury*, (1872), 7 Ch. App. 777, 802.

6. *Beattie v. Ebury*, (1872), 7 Ch. App. 777, 804; *Maddison v. Alderson*, (1883), 8 App. Cas. 467.

7. *Bisset v. Wilkinson*, [1927] A.C. 177.

8. *Bisset v. Wilkinson*. [1927] A.C. 177.

9. *Smith v. Land and House Property Corporation*, (1884) 28 Ch. D. 7, 15.

10. *Reese River Silver Mining Co., Ltd. v. Smith*, (1869) L.R. 4 H.L. 64.

11. *Maggennis v. Fallon*, (1828), 2 Mol. 561, 588; *Scott v. Hanson*, (1829), 1 Russ. & M. 128; *Dimmock v. Hallett*, (1866), 2 Ch. App. 21.

the purchaser an exact idea as to the quality or quantity of the thing to be sold, they will be construed as representations of fact.¹

All representations do not constitute the terms of a contract. Some representations may constitute terms of a contract while others may not be intended by the parties to be parts of the contract.

There is no question of any representation by the decree-holder to the auction-purchaser that the judgment-debtor has a salable interest in the property.²

Means and includes.—As to the implication of the expression ‘means and includes’ see under Section 17, at p. 354, *supra*.

Misrepresentation.—Misrepresentation is: (1) the positive assertion, in a manner not justified by the information of the person making the assertion, of what is not true, though he innocently may believe it to be true; (2) any breach of duty which breach, though without an intent to deceive, gains an advantage to the person committing it or to a person claiming under the person committing the breach of duty when such breach of duty has misled the other party to the contract to his prejudice or to the prejudice of any one claiming under the party misled; (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject-matter of the agreement. Misrepresentation may thus be innocent or fraudulent. It may also arise out of a positive assertion or a mere innocent breach of duty. The causing of a fundamental mistake as to the subject-matter of the agreement, even though innocently, is also misrepresentation in the eye of the law.

Misrepresentation is *suggestio falsi* in a matter of substance essentially material to the subject, whether by acts or by words, by manoeuvres, or by positive assertions or material concealment (*suppressio veri*) whereby a person is misled and damnified.³

The conduct of a party may sometimes amount to a representation of fact as much as a positive assertion.⁴ Silence on the part of a party, *per se*, is not misrepresentation in the eye of the law. Thus, the failure on his part to disclose a fact which was material and which if known might dissuade the other party to enter into the contract does not of itself render the contract reached voidable in favour of the latter.⁵ In the absence of a fiduciary relation between vendor and purchaser in the negotiation, neither party is bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence thus does not amount to legal fraud, however it may be

1. *Brooke v. Rounthwaite*, (1846), 5 Hare, 298.

2. *Thakarlal v. Rama*, A.I.R. 1961 Raj. 193.

3. Wharton: *Law Lexicon*, 14th ed., 1953, 660-661.

4. *R. v. Barnard*, (1837), 7 C. & P. 784.

5. *Fox v. Mackreth*, (1788), 2 Cox, Eq. Cas. 320, 321; *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161, 227; *Smith v. Hughes*, (1871), L.R. 6 Q.B. 597.

viewed by moralists.¹ When however there has been some misleading conduct or active misrepresentation on the part of a party intended to induce the other to believe in the existence of a non-existing fact, which might influence the mind of the latter to conclude the contract it will be a sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement.²

Subject to the above, it may be observed that silence or non-disclosure of facts does sometimes operate in the eye of the law as misrepresentation of facts. Silence may in a given case distort positive assertions; in such case it will entitle the party misled to relief. Where, again, the parties are in a fiduciary relationship to each other, or where the nature of the contract requires utmost or abundant good faith between the parties, silence as to a material fact will be tantamount to misrepresentation entitling the party misled to equitable relief. All contracts of insurance, for example, are contracts *uberrime fidei*. The assured is therefore under a duty to disclose all material facts which are known to him. The question in each case is not whether the assured believed any particular circumstance to be material but whether it was in fact material.³ Even in the cases where there has been no fiduciary relation between the parties or where the contract is not one requiring most abundant good faith (*uberrima fides*) a representation if made must be complete and true; otherwise, the partial representation though, *per se*, true will be in law a misrepresentation.⁴

No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available means of knowledge.⁵ A misrepresentation whether innocent or fraudulent or whether forming a part of the contract or not renders the contract voidable and not void. A voidable contract is valid until avoided. It is only when the misrepresentation has been responsible for inducing the misled party to conclude a contract which was something fundamentally different from the one contemplated that the contract will be, because of the misrepresentation, a totally void one.⁶

Positive assertion.—Misrepresentation may consist in a positive assertion made by a party of what is not true. The fact that the party making the assertion had believed that what he was asserting was true is not material. If according to the judicial criterion, the assertion positively made was not warranted or justified by the quantum or nature of the information

1. *Turner v. Green*, [1895] 2 Ch. 205; *Laidlaw v. Organ*, (1817) 2 Wheat. 178.

2. *Walters v. Morgan*, (1816), 3 De G. F. & J. 718, 723.

3. *London Assurance v. Mansel*, (1879), 11 Ch. D. 363. See also above.

4. *Tapp v. Lee*, (1803), 3 Bos. & P. 367; *Ames v. Milward*, (1818), 8 Taunt. 637; *Dimmock v. Hallett*, (1866), 2 Ch. App. 21; *Oakes v. Turquand and Harding*, (1867), L.R. 2 H.L. 325, 342; *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805; [1951] 1 All E.R. 631.

5. *Central Rly. Co. v. Kisch*, (1867) L.R. 2 H.L. 99, 120; *Redgrave v. Hurd*, (1881), 20 Ch. D. 1; *Nocton v. Ashburton*, [1914] A.C. 932, 962.

6. *Cundy v. Lindsay*, (1878), 3 App. Cas. 459.

of the person making the assertion, it will be in the eye of the law a misrepresentation.¹

In equity it is immaterial whether the misrepresenter knew the matter to be false, or asserted it, without knowing if it were true or false; for the affirmance of that which is not known to be true is as unjustifiable as the assertion of that which is known to be false, since it is equally a means of deception. But equity would not relieve, if the misrepresentation were of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it, or if it were vague and inconclusive in its own nature, or if it were upon a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to have confided in the other. Equity cannot indemnify a person from the consequence of indolence and folly, or of careless indifference and neglect of easily accessible means of information.

If the representation amounts to a warranty, its untruth is actionable because the person making it has entered into a contract or warranty and not on the ground merely of mis-statement. Such representations may be collateral or not part of the principal contract.²

A party unknowingly making a false statement is required in law to state the actual fact if and when he comes to know of it.³ The law also requires the person making a statement which was correct when made to state the facts as they stood later in the course of negotiations if a change of time or circumstances rendered the earlier statement untrue in the changed context.⁴

Breach of duty.—Misrepresentation may consist in any breach of duty which gains an advantage to the person committing the breach or to any person claiming under the person committing the breach of duty. In order to constitute a misrepresentation, the breach of duty must mislead the other party to his prejudice or to the prejudice of any person claiming under the party misled. Thus where there is a fiduciary connection between the parties, relief may be granted for what is termed “fraud” although there has been no actual dishonesty.⁵ The duty concerned may be equitable as well as legal. The duties imposed on the seller or the buyer under Section 55 of the Transfer of Property Act, 1882, are legal. Any breach of such duties will be considered in law as misrepresentation for the purpose of the Contract Act. The party misled will be entitled to relief under the Transfer of Property Act as well as under Section 19 of the Contract Act.

Whether the non-disclosure of a fact was material or not is an issue of construction.⁶

1. *Mohan Lall v. Sri Gungaji Cotton Mills Co.*, (1899) 4 C.W.N. 369, 388.

2. Wharton: *Law Lexicon*, 14th ed., 1953, 660-661.

3. *Davies v. London and Provincial Marine Insurance Co.*, (1878), 8 Ch. D. 469, 475; *With v. O'Flanagan*, [1936] Ch. 575; [1936] 1 All E.R. 727.

4. *Davies v. London and Provincial Marine Insurance Co.*, (1878), 8 Ch. D. 469.

5. *Nocton v. Ashburton*, (Lord), [1914] A.C. 932; *Oriental Bank Corporation v. Fleming*, (1879) 3 Bom. 242, 267.

6. *Secretary of State v. Nilamekam*, (1883) 6 Mad. 406.

As to the effect of the information obtained as director of one company by a person who is also the director of another company see *Pratt (Bombay), Ltd. v. M. T. Ltd.*, and *Sassoon & Co. Ltd. v. Pratt (Bombay), Ltd.*, (1938) Bom. 421 P.C.

Causing fundamental mistake.—Misrepresentation may consist in causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. Such misrepresentation will render a contract voidable at the option of the party mistaken.¹

As to the effect of common, mutual and unilateral mistakes, see under Sections 20 and 22, *post*.

Innocent misrepresentation.—"To 'misrepresent', misrepresentations do not by themselves, import wilful falsehood or malice; misrepresentation of facts may be, and often is, innocent."² A misrepresentation is called innocent when it has been made by one of the parties without any such intention but which has nevertheless the effect of misleading the other. A misrepresentation will be innocent where the representor believes his assertion to be true and consequently has no intention of deceiving the representee. Innocent misrepresentation is where a person makes a representation which he reasonably and honestly believes to be true, but which is in fact false. Innocent misrepresentation, if it induced a contract, provides a defence to an action on the ground of breach of contract and will enable the deceived party to get the contract rescinded by the Court if the parties can be put back again in their legal position.

Where the innocent misrepresentation has not been incorporated in the contract, the plaintiff gets no relief under the English common law. Only under equity he will be entitled to rescind the contract, but not entitled to damages. When however the obligation arising under the contract has been made subject to a condition precedent, the party misled can insist on the fulfilment of the condition precedent.³ For further discussion as to the effect of innocent misrepresentation, see below.

Effect of innocent misrepresentation.—Where a party has been misled by an innocent misrepresentation he can through legal steps avoid the contract. In addition, he can recover damages when the innocent misrepresentation constituted a term of the contract. If the said innocent misrepresentation did not constitute a term of the contract and therefore did not form a part of the contract, the party misled will not be entitled to

1. In *re Nursey Spinning and Weaving Co.* (1880) 5 Bom. 92; *Oceanic Steam Navigation Co. v. Soonderdas Dhurumsey*, (1890), 14 Bom. 241; *Johnson v. Crowe*, (1874) 6 N.-W. P. 350; *Pertab Chunder v. Mohendranath*, (1889) 17 Cal. 291; 16 I.A. 233. The reasoning of Misra, J., in *Governor of State of Orissa v. Shivaprasad*, A.I.R. 1963 Orissa 217, as enunciation of law is confusing and will be ignored.

2. *Dowdall v. Kelly*, 4 Ir. Rep. Com. Law 556; Stroud: *Judicial Dictionary*, vol. 3, 1953, 1807.

3. *Pym v. Campbell*, (1856), 6 E. & B. 370.

recover damages. He can in such case only avoid the contract. Damages cannot be recovered for innocent misrepresentation unless the representation forms a term of the contract either as a condition or as a warranty. See *D. Bentley v. Harold Smith*, [1965] 2 All E.R. 65 C.A.

Where the representation constitutes a term of the contract and the said term is no more than a warranty, the party misled cannot repudiate the contract but can sue only for the damages for the loss sustained by him. If however the representation is a term of the contract and the said term is a condition, the party misled may either reject the contract or treat it as being still open. If he treats the contract as being still open, he can claim damages only after he has performed all the obligations resting upon himself. If, alternatively, he elects to reject the contract, he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.¹ If however the party misled has received the whole or any substantial part of the consideration for the promise on his part, the representation even where constituting a term as a condition ceases to be available to him as a condition. That is to say, after having received the whole or any substantial part of the consideration from the party responsible for the misrepresentation, the party misled cannot avail himself of the broken condition in order to reject the contract and yet sue the other party for a total failure to perform the contract. He will be allowed, in the circumstances, to avail himself of the broken condition only as a warranty, and his compensation will be by way of damages alone.² Moreover, there may be statutory provisions overriding the effect of the common and equitable law as stated hereinbefore. Under the English Sale of Goods Act, 1893, for example, where a statutory condition is broken, the buyer will not be free to reject the goods, but will have to rest content with the recovery of damages. The (Indian) Sale of Goods Act, 1930, too, in its Section 13, requires the buyer to treat the breach of the condition as a breach of warranty in case he does not choose to waive the condition. Sub-section 2 of the same Section also lays down that where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

Where an innocent misrepresentation of fact does not form part of a contract but has been partly responsible for inducing the party misled to enter into the contract, he may get the contract rescinded. Damages will not lie in his favour in such case. He can only avoid the transaction and

1. *Wallis, Son and Wells v. Pratt*, [1910] 2 K.B. 1003, 1012; *Behn v. Burness*, (1863), 3 B. & S. 751; *Harling v. Eddy*, [1951] 2 All E.R. 212, 215.

2. *Behn v. Burness*, (1863), 3 B. & S. 751, 755; *D. Bentley v. Harold Smith*, [1965] 2 All E.R. 65 C.A.

the avoidance will be effective from the date of his repudiation of the contract.¹ For innocent misrepresentation and damages, *see also* under Section 73, *post*.

The relief of rescission generally consists in the cancellation of the contract. The advantages, where any received, must also be restored by the parties. The plaintiff will also be indemnified against the obligations that had been necessarily and inevitably created by the contract. He will not be indemnified against all loss which may have arisen out of the contract.² *See* Sections 27 and 28 of the Specific Relief Act, 1963.

There are however some exceptions to the above rule regarding the effect of an innocent misrepresentation of fact which though not forming part of the contract was partly responsible for inducing the party misled to enter into the contract. Damages are recoverable, in England, for example, under the doctrine of implied warranty of authority as well as under Sections 38 and 43 of the English Companies Act, 1948. Under the Transfer of Property Act, 1882, Section 55(2), the seller will be responsible for damages even if the buyer was aware of the defect in title. For the statutory rights and liabilities of the buyer and seller of immovable property under the Transfer of Property Act, 1882, *see* Section 55, *ibid*. Section 14 of the (Indian) Sale of Goods Act, 1930, similarly, imposes some implied undertakings on the seller of goods.

Fraudulent misrepresentation.—A misrepresentation is called fraudulent when it has been made knowingly and with a deliberate intention by one of the parties with a view to deceiving the other. The absence of honest belief is *sine qua non* for fraud.³ A fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true. In order to render itself fraudulent, the false statement must be made knowingly, or without belief in its truth or recklessly, careless whether it be true or false. A wicked mind is thus essential.⁴ A negligent statement is therefore not a fraudulent statement. When one does not knowingly make a false statement, or when one does not make a statement which one does not believe to be true, or when one does not make a statement careless whether what was stated was true or false, it will not be a case of fraudulent misrepresentation, though it may be one of inaccurate or negligent statement. When the representor honestly believed that what he asserted was true he will be taken in law as not to have made a fraudulent misrepresentation. If however the representor was grossly careless, if he was reckless in making a statement without caring to base it on any foundation of facts at all, he will be held, in law, as liable as

1. *Abraham S. S. Co. v. Westville Shipping Co.*, [1923] A.C. 773, 781; *Harrison v. Knowles and Foster*, [1918] 1 K.B. 608, 610; *Redgrave v. Hurd*, [1881], 20 Ch. D. 1; *Gilchester Properties, Ltd. v. Gomm*, [1948] 1 All E.R. 493.

2. *Newbigging v. Adam*, [1886], 34 Ch. D. 582, 595; *Whittington v. Seale-Hayne*, [1900], 82 L.T. 49.

3. *Derry v. Peek*, [1889] 14 App. Cas. 337.

4. *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 498.

if he had made a fraudulent statement. Some amount of care or caution is thus expected of a party when he makes a statement which will persuade the other to enter into a contract. That the representor was only grossly careless but not actuated by any motive will not be material as a defence.¹

Effect of fraudulent misrepresentation.—Where the fraudulent misrepresentation has caused a fundamental mistake as to the subject-matter of the contract, the contract will be void under the English common law. Apart from this exceptional case, a fraud renders a contract only voidable and not void. Where a fraudulent representation has induced or partly induced a party to enter into the contract, he will be entitled to rescind the transaction.² The voidable contract will remain valid until avoided. The party misled therefore will either accept the contract as binding or repudiate it within a reasonable time in England³ or within the time allowed in India by the law of limitation. Even when he seeks to affirm the contract, he will be entitled to bring an action of deceit to recover damages when the misrepresentation has been acted upon.⁴ Whether the fraudulent misrepresentation has been a term of the contract or not damages will be recoverable in tort. Even where the misled party elects to avoid the contract, that is, to repudiate it or rescind it, damages will be recoverable in his favour and against the misrepresenter.⁵ In an action for rescission, he can recover the price if any paid.⁶ In an action for specific performance against him he may plead fraud as a defence and may also counterclaim for damages.

In an action of deceit, or when alleging fraudulent misrepresentation at common law, in England, it is necessary to prove actual dishonesty. For this purpose it must be shown that the representor made a false statement which, at the time when it was made, he did not honestly believe to be true. In cases falling within the exclusive jurisdiction of equity, e.g., where there is a fiduciary connection between the parties, relief may be granted for what is termed 'fraud' although there has been no actual dishonesty.⁷

A principal cannot disclaim responsibility for fraudulent misrepresentations made by his agent which, though made before the agency commenced, to the agent's knowledge continued to influence the other party after his appointment as agent and finally induced the other party to enter into the contract which the agent had been authorised to make, and did make on behalf of the principal. It is the agent's duty, having made false representations, to correct them before the other party acts on them to his detriment ; where the agent continues to conceal the true facts and so the repre-

1. *Foster v. Charles*, (1830), 6 Bing. 396 ; *affd*, 7 Bing. 105.

2. *Kennedy v. Panama Royal Mail Co.*, (1867), L.R. 2 Q.B. 580, 587.

3. *Clough v. London and North Western Ry. Co.*, (1871), L.R. 7 Exch. 26, 35.

4. *Mullett v. Mason*, (1866) L.R. 1 C.P. 559 ; *Briess v. Woolley*, [1954] A.C. 333, 353 : [1954] 1 All E.R. 909, 918.

5. *Attwood v. Small*, (1838), 6 Cl. & Fin. 232, 444.

6. *Clarke v. Dickson*, (1858), E.B. & E. 148.

7. *Nocton v. Ashburton*, (Lord), [1954] A.C. 932.

sentations are continuing representations, the other party will be entitled to hold the principal liable.¹

Inducement.—A representation, whether innocent or fraudulent, does not of itself render a contract voidable. The Explanation to Section 19 makes it clear that fraud or misrepresentation renders a contract voidable only when it was responsible for inducing the party misled to enter into the contract.² It does not matter however whether or not the representation in question was the only factor responsible for inducing the party misled to enter into the contract. Even where it only partially affected his decision, the resulting contract will be voidable.³ But when a representation though made by a party was not known to the other or though known did not affect his decision as to his entering into the contract,⁴ it is not relevant for the purpose of law. Similarly, when the other party was aware that the representation made was untrue it cannot be taken as to have misled him in the matter of the formation of the contract and as such the representation in question is regarded in law as irrelevant.⁵ Section 115 of the Evidence Act, 1872, does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.⁶

Right of rescission.—Under Sections 19 and 19A, *infra*, when consent to an agreement is caused by coercion, fraud, or misrepresentation, or undue influence the agreement is a contract voidable at the option of the party whose consent was so caused.

The object of rescission is the restoration so far as is reasonably practicable of the *status quo ante*, a restoration that is clearly impossible unless the plaintiff is compensated for the adverse and direct consequences of having made the contract. See Sections 27 to 30 of the Specific Relief Act, 1963.

An action for rescission of a contract on the ground of innocent misrepresentation must be brought in England within a reasonable time.⁷ In India the Limitation Act, 1963, will govern the cause of action.⁸ As part of the remedy of rescission for an innocent misrepresentation which is not a term in the contract, the plaintiff is entitled to an indemnity against certain obligations arising out of the contract. This right does not extend to

1. *Briss & Ors. v. Woolley & Ors.*, [1954] 1 All E.R. 909 H.L.

2. *Currie v. Rennick*, (1886) Punj. Rec. No. 41; *Horsefall v. Thomas*, (1862), 1 H. & C. 90; *Smith v. Chadwick*, (1882), 20 Ch. D. 27, 44.

3. *Reynell v. Sprye*, (1851) 1 De G. M. & G. 656, 708; *Smith v. Chadwick*, (1882), 20 Ch. D. 27, 44; *Edgington v. Fitzmaurice*, (1885), 29 Ch. D. 459.

4. *Smith v. Chadwick*, (1884) 9 App. Cas. 187, 194; *Attwood v. Small*, (1838) 6 Cl. & Fin. 232; *Re Northumberland and Durham District Banking Co., Ex parte Bigge*, (1858), 28 L.J. (Ch.) 50.

5. *Irvine v. Kirkpatrick*, (1850), 7 Bell. Sc. App. 237; *Jennings v. Broughton*, (1854), 5 De. G. M. & G. 126; *Begbie v. Phosphate Sewage Co.*, (1875) L.R. 10 Q.B. 491.

6. *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P.C.

7. *Leaf v. International Galleries, (A Firm)*, [1950] 2 K.B. 86.

8. Item 59 of the Schedule to the Limitation Act, 1963.

all such obligations, but is limited to those necessarily created by the contract.¹

A mis-statement of the state of a man's mind is a misrepresentation of fact. A misrepresentation of intention may be a misrepresentation of fact.² A misrepresentation of fact is a ground for the rescission of a contract or for the refusal of specific performance even though it was honestly believed to be true. In this case, however, it is not a ground for the recovery of damages. It is no defence in England to an action based on misrepresentation that the person to whom the representation was made was offered the means of discovering its untruth.³ The Indian Contract Act, Section 19, Exception, however, makes it clear that if the party whose consent was caused by innocent misrepresentation or by fraudulent silence had the means of discovering the truth with ordinary diligence the contract will not be void at his option. It may be submitted that even though the contract in the given circumstances cannot be avoided by the party misled, he can be awarded damages for the loss sustained because of the misrepresentation or of the fraudulent silence. The acceptance of such a rule will however be a departure from the English rule of equity which allows the misled party only to avoid the contract when innocent misrepresentation has formed no part of the terms of the contract but does not allow damages.

The party misled by the fraudulent misrepresentation can not only avoid the contract but can also recover damages no matter whether the said fraudulent misrepresentation constituted a term of the contract or not. Thus a fraudulent misrepresentation will entitle the party misled to recover damages irrespective of the fact that the misrepresentation in question was a mere representation and as such did not form a part of the contract.

Where the party misled by the fraudulent or innocent misrepresentation has affirmed the voidable contract either expressly or impliedly he loses his right to rescind it.⁴ Not only the conduct of the misled party may go to show that he has affirmed the voidable contract in spite of his knowledge of the misrepresentation but his inaction in the matter of its repudiation has sometimes been treated as conclusive evidence of his decision to stand by the contract.⁵ It is the duty of the plaintiff, bearing in mind the peculiar nature of the property, to repudiate the contract at the very earliest possible moment after he has come to know of the misrepresentation.⁶ The lapse of a reasonable time would disentitle the misled party in England to a right of rescission. The law requires the misled party in England to disprove the

1. *Whittington v. Seal-Hayne*, (1900), 82 L.T. 49.

2. *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459, 483; *Angus v. Clifford*, [1891] 2 Ch. 449, 470.

3. *Redgrave v. Hurd*, (1881), 20 Ch. D. 1.

4. *Re Hop and Malt Exchange and Warehouse Co., ex parte Briggs*, (1866), L.R. 1 Eq. 483; *Scholey v. Central Ry. Co. of Venezuela*, (1868) L.R. 9 Eq. 266; *Cough v. London and North Western Ry. Co.*, (1871), L.R. 7 Exch. 26, 34.

5. *Clough v. London and North Western Ry. Co.*, (1871), L.R. 7 Exch. 26, 35.

6. *Wilde v. Gibson*, (1848), 1 H.L. Cas. 605. 632.

representation within a reasonable time, or else the party responsible for the misrepresentation may have acted on the faith that the other party has affirmed the contract.¹ A third party may also be misled by the inaction of the party who could, if he so elected, avoid the contract.² For the Indian law see *Limitation of time* under Section 19, *infra*. Where the defect in the title or conveyance was known to the plaintiff rescission will not lie.³

When a rescission of the contract has been prayed for and granted, the Court orders for the restoration of the advantages received by the either side. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief in favour of the plaintiff is not punishment on the defendant but compensation.⁴ When also the subject-matter of the contract has deteriorated in the hands of either of them though retaining its identity, restoration may be granted along with the necessary compensation.⁵ Subject to this it may be said that where a voidable contract cannot be wholly rescinded it will not be rescinded at all.⁶ Thus where the subject-matter of the contract has undergone some substantial change while in the hands of either of the parties, rescission is considered undesirable or impossible.⁷

A contract effected through misrepresentation being voidable, that is, valid until avoided, the party misled cannot get it rescinded after an innocent third party for value has acquired an interest in the subject-matter of the contract which was voidable.⁸ Where however the fraud has rendered the contract void, the innocent transferee for value is not protected.

The commencement of winding up proceedings completely bars the right of a shareholder to avoid the contract under which he obtained his shares.⁹

In some cases it has been held in England that executed contracts cannot be rescinded for innocent and material misrepresentation.¹⁰ This strict rule

1. *Leaf v. International Galleries*, [1950] 2 K.B. 86; (1950) 1 All E.R. 693

2. *Lindsay Petroleum Co. v. Hurd*, (1874), L.R. 5 P.C. 221, 240; *Aaron's Reefs v. Twiss*, [1896] A.C. 273, 294.

3. *Secretary of State v. Tellopeddi*, 87 I.C. 644; 48 M.L.J. 440; A.I.R. 1925 Madras 859; *Sada Kavar v. Tadepally Basaviah*, (1907) 30 Mad 284.

4. *Spence v. Crawford*, [1939] 3 All E.R. 271, 288.

5. *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, 456; *Spence v. Crawford*, [1939] 3 All E.R. 271, 279.

6. *Sheffield Nickel Co. v. Unwin*, (1877) 2 Q.B.D. 214; *Clarke v. Dickson*, (1858); E.B. & E. 148, 152.

7. *Clarke v. Dickson*, (1858) 2 E.B. & E. 148; *Western Bank of Scotland v. Addie*, (1867), L.R. 1 Sc. & Div. 145; *Vigers v. Pike*, (1842), 8 Cl. & Fin. 562; *Attwood v. Small*, (1838), 6 Cl. & Fin. 232.

8. *White v. Garden*, (1851), 10 C.B. 919; *Stevenson v. Newnham*, (1853), 13 C.B. 285, 302; *Scholefield v. Templer*, (1859) 4 De G. & J. 429, 433; *Clough v. London and North Western Ry. Co.*, (1871), L.R. 7 Exch. 26, 35; *Babcock v. Lawson*, (1879), 4 Q.B.D. 394; *Phillips v. Brooks, Ltd.*, [1919] 2 K.B. 243.

9. *Oakes v. Turquand and Harding*, (1867), L.R. 2 H.L. 325.

10. *Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326.

of law has not been held applicable where a fiduciary relation exists between the parties.

Where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase prior to completion, even though the misrepresentation be innocent. But if the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is completed, fraud must be proved before rescission can be granted.¹ In the absence of fraud, a misrepresentation as to the title or nature of the land sold or leased or as to the incumbrances thereon will not entitle the purchaser or lessor to obtain rescission after the transaction has been completed.² According to these decisions, it is an important principle that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase money and is put into possession, there is an end to all as between him and the vendor on that purchase. Otherwise, there never would be an end of the question.³

There are decisions, on the other hand, holding that the plaintiff can obtain rescission in spite of its completion.⁴

For further discussion as to the consequences of rescission of voidable contract see under Section 64, *post*. See also Sections 27 to 30 of the Specific Relief Act, 1963.

19. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent

1. *Armstrong v. Jackson*, [1917] 2 K.B. 822, 825; *Angel v. Jay*, [1911] 1 K.B. 666; *Edler v. Auerbach*, [1950] 1 K.B. 359, 373; [1949] 2 All E.R. 692, 698; *Wilde v. Gibson*, (1848) 1 H.L. Cas. 605, 632.

2. *Wilde v. Gibson*, (1848) 1 H.L. Cas. 605, 632; *Legge v. Croker*, (1811), 1 Ball & B. 506; *Manson v. Thacker*, (1878), 7 Ch. D. 620; *Allen v. Richardson*, (1879), 13 Ch. D. 524.

3. *Allen v. Richardson*, (1879), 13 Ch. D. 524, 541.

4. *Rawlins v. Wickham*, (1858), 3 De G. & J. 304; *Reese, etc. Mining Co., Ltd. v. Smith*, (1869), L.R. 4 H.L. 64; *Torrance v. Bolton*, (1872) L.R. 8 Ch. App. 118, 202; *A.-G. v. Ray*, (1874), 9 Ch. App. 397; *Redgrave v. Hurd*, (1881) 20 Ch. D. 1; *Whittington v. Seale-Hayne*, (1900) 82 L.T. 49; *Whurr v. Devenish*, (1904), 20 T.L.R. 285; *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468 P.C.

was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) *A*, intending to deceive *B*, falsely represents that five hundred maunds of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B*.

(b) *A*, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

(c) *A* fraudulently informs *B* that *A*'s estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d) *B*, having discovered a vein of ore on the estate of *A*, adopts means to conceal, and does conceal, the existence of the ore from *A*. Through *A*'s ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of *A*.

(e) *A* is entitled to succeed to an estate at the death of *B*. *B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A* and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

Contracts without free consent.—When consent to an agreement has been caused by coercion, fraud, or misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. The law however requires parties to a contract to show ordinary diligence in their transactions. The Exception to Section 19 says that even where consent has been caused by innocent misrepresentation or silence, though such silence is considered fraudulent within the meaning of Section 17, a contract will not be voidable because of the misrepresentation or silence if the party injured had had the means of discovering the truth with ordinary diligence.¹ The unsoundness of a horse may not be easily discernible, but the age of an ox is discernible up to a certain stage by an examination of his teeth. Suppose a farmer as purchaser of an ox says to the vendor, "If you do not deny it, I shall assume that the ox is not an old one". The vendor says nothing. The ox was however an old one. Here the vendor's silence is, under Section 17, equivalent to speech and is fraudulent. Though ordinarily a purchase of the ox will be voidable on ground of fraud under Section 17, the Court under Section 19, Exception, may not in given circumstances hold the purchase as voidable if it is of opinion that so far as the particular ox was concerned the farmer purchasing the animal could easily ascertain its age by examining its teeth. In order to reduce the extent of voidable agreements the law may legitimately expect people to discover the truth when it could be so done with ordinary diligence.

The Transfer of Property Act, 1882, however seeks to safeguard the interests of the transferee of immovable property in various ways. See Sections 55, 60B, 65, 108, 109, 120, *ibid.* So does Section 13 of the Specific Relief Act, 1963. See also Sections 9, 18, 26, 27 to 30, *ibid.*

The Exception.—The Exception concerns innocent misrepresentation and fraudulent silence in a case where the party misled had the means of discovering the truth with ordinary diligence. It does not concern fraudulent misrepresentation.¹ The Exception to Section 19 lays down that where consent was caused by innocent misrepresentation or fraudulent silence, the contract will not be voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.² Under Section 18, *supra*, we have seen that in England, in equity, an innocent misrepresentation of fact, even where the representation does not form part of a contract but has been partly responsible for inducing the party misled to enter into the contract, enables the misled party to get the contract rescinded. Damages will not however lie in England in his favour in such case. In spite of this background of equity in England it may be submitted that even where the innocent misrepresentation has not formed part of the contract, in India, in equity, damages may be awarded in favour of the party misled. The disability in the given circumstances of the misled party in the matter of avoidance of a contract to which he was induced by innocent misrepresentation or fraudulent silence may be compensated for by awarding damages in his favour for the loss he has sustained because of the innocent misrepresentation or fraudulent silence. In the absence of such construction and application of the Exception to Section 19, the Indian law will be harder than the English rule of equity to the prejudice of the expectation of fair play in dealings between citizen and citizen. There is indeed no bar to the Court in awarding damages in favour of the misled party for the loss he has sustained because of the innocent misrepresentation or fraudulent silence on the part of the other party or his agent. Where the Legislature has sought to depart from the English rule of equity in one particular respect, the Courts in India can apply the law making it conformable to the sense of equity without violating the letter or even the spirit of the law as enacted by the Legislature. In the absence of the Court's power to award damages in a case even where the innocent misrepresentation or the fraudulent silence was no term of the contract wrongly induced, the Exception to Section 19 will make the Indian law indeed harder and less equitable than the English

1. *Abdulla v. Girdhari*, (1904) Punj. Rec. 49; *Niaz Ahmad v. Parsotam*, (1930) 53 All. 374; 129 I.C. 545; A.I.R. 1931 All. 154; *John Minas v. Malchus*, (1939) 1 Cal. 389; A.I.R. 1939 Cal. 473; *Morgan v. Govt. of Haidarabad*, (1888) 11 Mad. 419; *Jogendra v. Chandra*, (1915) 42 Cal. 28, 34; 24 I.C. 193; *Subramanian v. Official Assignee*, 133 I.C. 372; A.I.R. 1931 Mad. 603; *Ganpat Ranglal v. Mangilal*, A.I.R. 1962 M.P. 144.

2. *Harilal v. Mulchand*, (1928) 52 Bom. 883; 113 I.C. 27; A.I.R. 1928 Bom. 427.

rule of equity on the subject, as it is sometimes supposed to be.¹

Where the vendor makes an express recital in the sale-deed about the non-existence of the mortgage, which was false to his knowledge, the case does not fall within the Exception to Section 19 and the contract is voidable at the instance of the vendee.²

Ordinary diligence.—The quantum of diligence which will be required in order to be termed ordinary diligence within the meaning of the Exception to Section 19, will vary from case to case. The standard of a reasonable man in the context of the value of the subject-matter, the difficulties of the situation, the nature of the transaction concerned³ and such other allied factors will be the criterion of ordinary diligence for the purpose of the Exception to Section 19.

The Explanation.—Where the falsification or concealment had an important bearing in obtaining the other party's consent, the Explanation to Section 19 would not apply.⁴

The option of the party misled.—The party misled by fraud or misrepresentation may seek to avoid the contract on ground of fraud or misrepresentation, or he may, alternatively, if he likes, insist on the performance of the contract as if there had been no fraud or misrepresentation.⁵ He may insist that he should be put in the position in which he would have been if the representations as made by the other party had been true.⁶ Section 19 does not entitle a party to insist on an entirely different contract being performed.⁷ The power of the Court in the matter of restitution or specific enforcement is limited by its feasibility.⁸ The power is also limited in its exercise by a sense of reasonableness. Section 43 of the Transfer of Property Act, 1882, lays down that where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract or transfer subsists. This rule however does not impair the right of transferees in good faith for consideration without notice of the existence of the said

1. *John Mines v. Malchus*, (1939) 1 Cal. 389, 398 : 184 I.C. 321 : A.I.R. 1939 Cal. 473 ; see also *Mahomed Kala Mea v. Harperink*, (1908) 36 I.A. 32 : 36 Cal. 323 ; *Rustomji v. Vinayak*, (1910) 35 Bom. 29, 34.

2. *Ganpat Ranglal v. Mangilal*, A.I.R. 1962 M.P. 144.

3. *Re Nursey Spinning and Weaving Co.*, (1880) 5 Bom. 92 ; *Shoshi Mohun v. Nobo Kristo*, (1878) 4 Cal. 801.

4. *Mithoolal v. L.I.C.*, A.I.R. 1962 S.C. 814.

5. *Haji Mahomed v. Ramappa*, (F.B.), A.I.R. 1929 Nag. 254 ; *Muralidher v. International Film Co.*, A.I.R. 1943 P.C. 34, 39.

6. *Baskcomb v. Beckwith*, (1869) L.R. 8 Eq. 100.

7. *Haji Mahomed v. Ramappa*, (F.B.), A.I.R. 1929 Nag. 254.

8. *Morgan v. Government of Haidarabad*, (1888) 11 Mad. 419.

option. See also Section 13 of the Specific Relief Act, 1963.¹

The rule of estoppel, for which see Section 18, *supra*, often results in realisation of only damages in favour of the misled party.

The right of third party under Section 19 or 19A cannot be availed of by way of defence in a suit.²

Contract by coercion.—Coercion for the purpose of the Contract Act has been defined under Section 15, *ante*. Under Section 19 it is, among other things, laid down that when consent to an agreement is caused by coercion, the party whose consent was so caused may avoid the agreement at his option.

In England the word 'duress' is used for coercion. Duress means actual violence or threats of violence calculated to produce fear of loss of life or of bodily harm. A party to a contract procured by duress or undue influence cannot be said to have given his free consent thereto, and as such the contract is voidable at his instance. In order to constitute itself a duress, the threat must be illegal, that is, it must be a threat to commit a crime or a tort. Secondly, in England, the duress must relate to the person of the party and not to his goods.³ Where the threat to do harm to a party has not been unlawful, but the harm in contemplation would be only an incident in law of his own conduct, a contract based on such threat is not generally voidable for duress.⁴ On the ground of public policy however sometimes a contract even though based on a lawful threat may be declared void.

It will be remembered that according to Section 15 of the Indian Contract Act, 'coercion' is the committing or threatening to commit any act, forbidden by the Indian Penal Code, or the unlawful detaining of or threatening to detain any property to the prejudice of any person whatever; thus not only the property of the party to the agreement but the person or property even of a third person may be threatened. The Indian law of coercion is thus more equitable than the English law of duress.

By the common law of England, a contract made during duress is not void but voidable; and the person upon whom it is practised may avail himself of the duress as a special defence to an action thereupon at any time. But the person who has employed the force cannot allege it as a defence if the contract be insisted upon by the other.

Where a person is not a free agent, and is not able to protect himself, the Court will protect him, and will set aside a contract made under duress.

1. The Specific Relief Act, 1877, has been repealed and replaced by the Specific Relief Act, 1963, with effect from 1 March, 1964.

2. *Trimbak Bhikaji v. Shankar Shamrav*, (1911) 36 Bom. 37.

3. *Atlee v. Backhouse*, (1838) 3 M. & W. 633, 650; *Skeate v. Beale*, (1840), 11 Ad. & El. 983.

4. *Smith v. Monteith*, (1844) 13 M. & W. 427; *Cumming v. Ince*, (1847) 11 Q.B. 112; *Powell v. Heyland*, (1851), 6 Exch. 67; *Biffin v. Bignell*, (1862), 7 H. & N. 877; *Fisher & Co. v. Apollinaris Co.*, (1875), 10 Ch. App. 297; *Thorne v. Motor Trade Association*, [1937] A.C. 797; [1937] 3 All E.R. 157.

Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the Court in setting aside a contract made by him on account of some oppression or fraudulent advantage, or imposition attendant upon it.¹ Even a marriage under duress may be declared void.²

The duress that will invalidate a maritime salvage agreement is less than the duress required at common law in England to invalidate an ordinary agreement ; if the remuneration demanded is so exorbitant as to be inequitable, that will be duress sufficient to invalidate a salvage agreement.³

The petitioner's father, after fighting with anti-communist forces in Yugoslavia, left the country in 1944 ; he reached England in 1947. The petitioner and her mother, after suffering many hardships, left Yugoslavia and arrived in England on November 11, 1956. In London they were met by the petitioner's father and the respondent, a Yugoslav refugee, whom the father introduced to the petitioner as the man whom she was to marry. The respondent was fourteen years older than the petitioner. The petitioner refused the proposal. During the period between November 11 and December 29, 1956, there were quarrels between the father and the petitioner concerning the proposed marriage. The father threatened to send the petitioner back to Yugoslavia if she did not marry the respondent ; she told her father that she would rather commit suicide than return there. On December 28 there was an argument between them about the marriage and the father struck her. On December 29, 1956, the petitioner and the respondent, in the presence of her father and two other Yugoslavs, went through a ceremony of marriage at a register office. The petitioner, so the Court found, understood the nature of the ceremony. After the ceremony the petitioner said that she did not agree, locked herself in her room, and did not thereafter see the respondent again. Both parties to the marriage ceremony were found to have acquired domicile of choice in England. On petition for nullity on the grounds of mistake and duress it was held that though the petitioner had understood the nature of the ceremony, she had established that she never consented to the marriage, but was driven to go through the ceremony by terror instilled in her by her father's threats ; therefore, a decree of nullity would be granted.⁴ *Seemle*, the effect of duress on marriage is to render it voidable, not void.

The question of coercion is one of fact depending upon the circumstances of each case.⁵ The fact that one party was in a strong bargaining

1. Wharton : *Law Lexicon*, 14th ed., 1953, 356.

2. *Scott v. Sebright*, (1886) 12 P.D. 21.

3. Stroud : *Judicial Dictionary*, 3d. ed., 1952, 896 ; *The Rialto*, [1891] P. 175 ; *The Mark Lane*, 15 P.D. 135 ; *The Medina*, 1 P.D. 272 ; *The Silesia*, 1 P.D. 177.

4. *Parojic (otherwise Ivetic) v. Parojic*, [1959] 1 All E.R. 1 ; *Scott v. Sebright*, (1886) 12 P.D. 21, 31.

5. *Bhagwan v. Nayan Kunwarba*, A.I.R. 1953 Sau. 53 ; *Satgur v. Har Narain*, 7 Luck. 64 : A.I.R. 1932 P.C. 89 ; *Gopal v. Jagannath*, A.I.R. 1935 Bom. 362.

position does not establish coercion, fraud, or misrepresentation. A contract cannot be avoided on that ground.¹ Section 19 cannot apply where the contract itself contains a defeasance clause. And if the conditions of such clause are fulfilled, the party who is given right to annul the contract under it is entitled to do so unless the other party proves that the former has waived his rights.²

Fraud.—Fraud does not make a transaction void but only voidable at the instance of the person defrauded.³ Fraud as an inducement to a contract renders it voidable. Fraud in the performance of a contract is no ground for rescission.⁴

Section 19 entitles the party whose consent to an agreement has been obtained by fraud and misrepresentation to treat the contract voidable at his option. It gives him the option either to treat it as binding or to treat it altogether void, and if he treats it altogether void he can withdraw any advantage that had been granted under fraud to the party practising fraud on him. He may resile from the position in which he has been placed on account of the fraud and misrepresentation.⁵

The Explanation to Section 19 makes it clear that in order to entitle a party to avoid the contract on the ground of fraud or misrepresentation it has to be established that the fraud practised or misrepresentation made had actually caused him to consent to the contract sought to be avoided. If the fraud or misrepresentation had had no causal connection with the formation of the contract, the plea of fraud or misrepresentation will not avail the party seeking to avoid the contract.⁶

A by misrepresentation leads *B* erroneously to believe that five hundred maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory which show that only four hundred maunds of indigo have been made. After this, *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation.

As to further discussion on the necessity of inducement as caused by fraud or misrepresentation see under Section 18, *supra*.

Where a party who has undertaken to do a certain work had had the means, if he had been ordinarily diligent, to know everything about the work there can be no question of his having been induced by any misrepresentation or fraudulent non-disclosure of the facts, so as to entitle him to avoid the contract under the Section.⁷ Under the Exception to Section 19, ordinary diligence is necessary if it is a case of active misrepresentation or silence

1. *Cotton Manufacturers, Ltd. v. J.N. Tewari*, A.I.R. 1959 All. 639.

2. *Western India Life Insurance Co. Ltd. v. Asima Sarkar*, A.I.R. 1942 Cal. 412.

3. *Rangnath v. Govind*, (1904) 28 Bom. 639.

4. *Jamsetji v. Hirjibhai*, (1913) 37 Bom. 158 : 15 Bom. L.R. 192 ; *Fazal v. Mangaldas*, (1921) 46 Bom. 489, 508 : 66 I.C. 726.

5. *Mangilal v. Appellate Tribunal*, A.I.R. 1957 Raj. 167.

6. *Currie v. Rennick*, (1886) Punj. Rec. No. 41.

7. *Namayya v. Union of India*, A.I.R. 1958 Andhra 533.

amounting to fraud. Cases of fraud by active misrepresentation as defined under Section 17(3) are not covered by the Exception to Section 19.¹

Where the petitioner and the respondent went through a ceremony of marriage without any intention on the part of the husband respondent to regard it as a real marriage, it was held that the consent of the petitioner was obtained by fraud and that the marriage in question was a mere pretence and was null and void.²

A intending to deceive B falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B. B having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A. A is entitled to succeed to an estate at the death of B. B dies. C having received intelligence of B's death, prevents the intelligence reaching A and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A. A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage; B may either avoid the contract or may, alternatively, insist on its being carried out and the mortgage-deed redeemed by A.³ Under Section 55 of the Transfer of Property Act, 1882, clause (g), sub-section (1), in the absence of a contract to the contrary, the seller is bound, *inter alia*, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property existing up to the date of the sale.

A contract between the railway administration and an adult passenger on the basis of a half-ticket is voidable and not void.⁴

Where the fraud had been in fact perpetrated and there was no difference in the degree of guilt of the plaintiff and that of the defendant, the Court will not assist any of the parties.⁵

Documents mistakenly signed.—Cases arise where a person is induced by the fraud of another to put his signature to a document embodying a contract quite distinct from the one the former had contemplated. The person directly responsible for the fraudulent inducement may either be the other party to the contract embodied or even a stranger. Now, the person signing the document may or may not be negligent in his doing. Even if he was, the contract as embodied in the document could not be enforced against

1. *Niranjan v. Tirilochan*, A.I.R. 1958 Orissa 81; *Venkataratnam v. Sivaramudu*, A.I.R. 1940 Mad. 560; *Apcar v. Malchus*, (1939) 1 Cal. 389; A.I.R. 1939 Cal. 473; *Niaz Ahmad v. Persottam*, 53 All. 374; A.I.R. 1931 All. 154.

2. *Miss Shireen v. John James*, A.I.R. 1952 Punj. 277.

3. Whitley Stokes, *Anglo-Indian Codes*, vol. I, 1887, 557, observes that the word "redeemed" in illustration (c) to Section 19 probably means "paid off".

4. *Union of India v. Benode*, A.I.R. 1962 Cal. 48.

5. *Vilayat Husain v. Misran*, (1923) 45 All. 396.

him.¹ Only in the case of a negotiable instrument negligence on the part of the person signing the document will impose liability on him in favour of the holders in due course.² Apart from the case of a negotiable instrument and at a particular stage of its life, the contracts in question were invalid not merely on the ground of fraud, but also on the ground that the mind of the person signing the document did not accompany the signature. So far as the contract embodied in the document was concerned, he never intended to be a party thereto and therefore in the eye of the law never signed the contract to which his name is fraudulently appended. Such a signature is no better than a forged one.³ In law, the effect would be the same even where the person responsible for the mistake had had no fraudulent intention.⁴ The person induced to sign the document in order to get relief has to establish that the contract he contemplated was fundamentally different in its nature from the one embodied in the agreement.⁵ The misrepresentation must be as to the character and class of the deed and not merely as to the contents thereof. The relief to be granted to the person fraudulently induced to sign a contract is thus confined to a case where the contract embodied in the document is something quite distinct in its character and class from the one actually contemplated. When the two contracts are of the same kind, though differing only in details, in contents or legal effect, the Court will not protect him.⁶

Where *A*, an illiterate woman, executes a deed under the impression that she is executing a deed authorising *B*, her distant nephew, to manage her lands, but within a few months detects that it was in reality a deed of gift of those lands in favour of *B* and the evidence shows that *A* never intended to execute such a deed of gift and that the deed was not read over or explained to her before she signed it, the deed was held as vitiated by fraud and was therefore void and inoperative.⁷

Where a person has purchased certain land and the vendor has not only failed to disclose to the vendee that he had leased the land to a third party but has represented that the vendee could take immediate possession and cultivate the land, the sale is voidable and the absence of exercise of due diligence by the vendee is no defence open to the vendor.⁸

1. *Thoroughgood v. Cole* (1584) 2 Co. Rep. 9.a; *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; *Lewis v. Clay* (1897) 67 L.J.Q.B. 224; *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489.

2. *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489.

3. *Vorley v. Cooke* (1857) 1 Giffard 230, 236.

4. *Bank of Ireland v. McManamy*, [1916] 2 I.R. 161.

5. *National Provincial Bank of England v. Jackson* (1886) 33 Ch. D. 1; *Howatson v. Webb*, [1907] 1 Ch. 537, *affd.*, [1908] 1 Ch. 1.

6. *Blay v. Pollard and Morris*, [1930] 1 K.B. 628; *Howatson v. Webb*, [1907] 1 Ch. 537, *affd.* [1908] 1 Ch. 1; *Howard*, [1963] *Muskham, Finance, Ltd. v. 1 All E.R.* 81, 83, C.A.

7. *Patil Bala v. Santimay A.I.R.* 1956 Cal. 575.

8. *Venkataramnam v. Sivaramudu*, A.I.R. 1940 Mad. 560; *Niaz Ahmed v. Parshotam A.I.R.* 1931 All. 154; 129 I.C. 545; 53 All. 374; 1331 A.L.J. 153; *John Minas Apear v. Louis Caird*

When a deed of one character, is executed on a representation that it is of a different character, it is wholly void and inoperative. Such a deed did not require to be set aside under Article 91 and a suit to recover possession of the properties comprised therein would be governed by Articles 142 and 144 of the Limitation Act, 1908.¹ Now see Articles 64 and 65 of the Limitation Act, 1963.

When a voidable transaction is avoided, the avoidance is effective not from the date but from the date of the original transaction itself. The effect of the avoidance is to get rid of the transaction with the result that in law it is as if the transaction had never taken place.²

If a person executes a document knowing its contents but misappreciates its legal effect, he cannot deny its execution.³ If, however, as noted above, the plea of *non est factum* is to succeed, what has to be established is that the misrepresentation which caused the signature was a misrepresentation of the character and class of the document in question and not a misrepresentation simply as to its contents.⁴

Misrepresentation.—When consent to an agreement has been caused by misrepresentation, the agreement is voidable at the option of the party whose consent was so caused.

The Exception to Section 19 however lays down that even if the consent was caused by misrepresentation as defined in Section 18 or fraudulent silence as defined in the Explanation to Section 17, the contract will not be avoidable at the option of the party misled if he had had the means of discovering the truth with ordinary diligence. Illustration (b) to Section 19 exemplifies this rule.

As it has been observed by the Fifth Indian law Commission,⁵ the Exception to Section 19 does not apply to active fraud as distinguished from fraudulent silence and innocent misrepresentation. The word 'fraudulent' in the Exception does not qualify 'misrepresentation' but it qualifies only silence.⁶ The wordings of the Section 19 should be made unambiguously clear while redrafting the Indian Contract Act.

As to the effect of misrepresentation *ees* under Section 18, *supra*.

Limitation of time.—A party is entitled to resist the claim made against him by pleading fraud, and he is entitled to urge that plea though he had not brought a suit to set aside the transaction. In the circumstances he is not precluded from urging that plea by lapse of time⁷ The option of avoid-

Malchus (1939) 1 Cal. 389 : 184 I.C. 321 : A.I.R. 1939 Cal. 473 : 43 C.W.N. 347; *Morgan v. Govt. of Haiderabad* 11 Mad. 419.

1. *Appanna v. Venkatappadu* A.I.R. 1953 Mad. 611.

2. *Sundara Rao v. Commissioner of Income-tax*, A.I.R. 1957 Mad. 451; *Satgur Prasad v. Har Narain*, A.I.R. 1932 P.C. 89.

3. *Dagdu v. Bhana* (1904) 28 Bom. 420.

4. *Mushtam Finance, Ltd. v. Howard* [1963] 1 All E.R. 81, 83 C.A.

5. Thirteenth Report (Contract Act, 1872), 23, para. 45.

6. *Niaz Ahmad v. Parshotam*, 53 All. 374.

7. *Rangnath v. Govind*, (1904) 28 Bom. 639 : 6 Bom. L.R. 592.

ing a contract procured in any of the ways mentioned in Sections 19 and 19A can be exercised by the party's representatives unless such rights have been lost by the party by acquiescence or otherwise.¹ An heir of a party to the contract is a person interested in the contract and can sue to set it aside.² For further notes, see under Section 19A, *infra*.

Rescission.—Section 19 of the Contract Act does not require that an agreement shall be rescinded in a particular form, and all that Section 66 provides for is that the rescission of a voidable contract may be communicated or revoked in the same manner and subject to the same rules, as apply to the communication or revocation of a proposal.³

19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

Consent by undue influence.—When consent to an agreement has been caused by undue influence, the contract so reached is voidable at the option of the party whose consent was so caused.⁴ A contract made on the basis of consent obtained by undue influence may be set aside by the Court absolutely. If however the party whose consent was obtained by undue influence has received any benefit from the contract, the Court may set aside the contract on such terms and conditions as may seem just. A's son has forged B's name to a promissory note. B under the threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set aside the bond. A a money-lender, advances Rs. 100 to B, an agriculturist, and by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay Rs. 100 with such interest as may seem just.⁵ The option of avoiding a contract procured by undue influence under

1. *Manbhari v. Sri Ram*, (1936) All. L. J. 1215 : 165 I.C. 240 : A.I.R. 1936 All 672.

2. *Shraavan v. Kashiram*, (1926) 51 Bom. 133 : 100 I.C. 932 : 29 Bom. L.R. 115 : A.I.R. 1927 Bom. 384.

3. *Official Receiver v. Jugal Kishore* (F.B.), A.I.R. 1963 All. 459.

4. *Muralidhar v. International Film Co. Ltd.*, A.I.R. 1943 P.C. 34.

5. See also *Moithooramohun v. Soorendra*, (1875) 1 Cal. 108 ; *Mackintosh v. Hunt*, (1877) 2 Cal. 202 ; *Chunni v. Rup Singh* (1888) 11 All. 57 ; on appeal *Raja Mohkam v. Raja Rup Singh*, (1893) 20 I.A. 127 : 15 All. 352 ; *Dhanipal v. Maneshar*, (1906) 33 I.A. 118 : 28 All. 570 ; *Balkishan v. Madan* (1907) 29 All. 303 ; *Poma v. William*, (1907) 31 Bom. 348 ; *Maneshar v. Shadi Lal*, (1909) 36 I.A. 96 : 31 All. 386 ; *Ranee Annapurni v. Swaminatha*, (1910) 34 Mad. 7 : 6 I.C. 439.

Section 19-A is not restricted by the provisions of the Mahomedan law.¹

As to definition of undue influence, cases of undue influence and the various questions relating thereto, see Section 16, *supra*. See also Sections 27 to 30 of the Specific Relief Act, 1963, and Section 64 of the Contract Act, *post*.

Option of the party misled.—A contract to which consent of a party has been obtained by undue influence is voidable at the option of the party unduly influenced. The contract being voidable, as opposed to void, will stand unless it is avoided. The voidable contract will continue as a valid contract until repudiated. It is not that it will remain invalid until confirmed.² The voidability of the contract is an imperfection or defect which can be cured by the act or confirmation of the person who could avoid the contract because of the undue influence. Acceptance of rent will make good a voidable lease. The right under a voidable contract continues until it is avoided and therefore restoration of property handed over in pursuance of a voidable contract cannot be claimed until the instrument, where any, is avoided either by the act of parties or through the Court.³

Cases.—A contract procured by undue influence is only a voidable one and only gives the person under undue influence a right of choice or election. Such a right, once exercised, is exhausted. So, if by notice expressly given or implied by conduct, the promisor elects to affirm, he can never afterwards claim to avoid; similarly if he has once elected to avoid, he can never afterwards be allowed to affirm in his own interest. There is no *locus poenitentiae* in either case.⁴

Where the lease has been the result of undue influence, at the worst it makes the lease only voidable. A Court cannot disregard a voidable contract unless it is avoided or set aside (by a Court) at the instance of the other party.⁵

Where a donor of a gift is the victim of fraud or undue influence it is for him to have the alienation set aside on that ground and if he stands by, his wife has no *locus standi* to set aside the gift on those grounds.⁶

In 1937 a lady of sixty-six years of age, unversed in business, whose property had been managed by her brother until his death in 1936, was being advised in the preparation of her will, by the respondent, her solicitor, who had for many years been her family solicitor and then had the management of her property. By the first draft of her will her executors were to be the respondent and a bank, and her residuary estate was to be given to charities. Between the first consultation in October, 1936, and the execution of the will,

1. *Mahboob v. Abdul*, A.I.R. 1964 Raj. 250.

2. *Duncan v. Dixon*, 44 Ch. D. 211.

3. *Asaram v. Ludheswar* (F.B.), A.I.R. 1938 Nag. 335; *Petherpermal v. Muniandy*, 35 Cal. 551 P.C.; *Husen v. Rajaram*, A.I.R. 1914 Nag. 75.

4. *Kunja Lal v. Hara Lal*, A.I.R. 1943 Cal. 162.

5. *Santosh v. Nanda*, A.I.R. 1958 Cal. 56.

6. *Natha Ram v. Sohan Devi*, A.I.R. 1949 E.P. 277.

there were some twenty interviews between the testatrix and the respondent at which her will was discussed. The will that she ultimately executed appointed the respondent to be her sole executor and gave the residuary estate to him, a clause being included requesting him to apply the same in accordance with a letter not yet written. The residuary gift was of substantial value. The will was drawn by the respondent and executed in his office. The testatrix had no independent advice. In 1939 the respondent advised the testatrix to execute a codicil, which he drew, revoking the gifts to charities. The testatrix executed the codicil. The consequence of the revocation of the gifts to charities was that their amount fell into residue. The testatrix died in 1947 and the respondent proved the will and codicil. In action to revoke the grant of probate on the grounds that the testatrix did not know and approve the contents of her will or of her codicil it was held by the House of Lords that the burden of proof on the respondent to establish that the testatrix knew and approved the contents of her will and codicil in so far as they benefited him was, in the circumstances of the case, a very heavy one.¹ The evidence given by the author of the will, who was also its chief beneficiary, has to be regarded with suspicion, and each piece of evidence in such case demands the closest scrutiny and the testimony cannot be accepted without vigilance or jealousy.²

If a person who seals and delivers a deed is misled by the statements or misrepresentations of the persons procuring the execution of the deed, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all because he was neither minded nor intended to sign a document of that character or class as, for instance, a release while intending to execute a lease.³

Where Rangamoni signed a document under the belief that she was signing a power-of-attorney whereas she was made to execute a deed of gift and exchange, thereby alienating the property from herself to the defendant, the Court held that the contract was void *ab initio*.⁴

Where Titai executed a document under the impression that it was a lease, when in fact it was a deed of gift, the Court held there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something of an altogether different character. Thus if there was no real execution, the document was wholly void and not merely voidable.⁵

The term 'lawful' agreement excludes not only unlawful agreements the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which were on the face of them void. The word 'lawful' cannot be construed as wide enough to include an enquiry as to whether the

1. *Barry v. Butlin* (1838), 2 Moo. P.C.C. 480.

2. *Wintle v. Nye*, [1959] 1 All E.R. 552 H.L.

3. *Mohd. Hussain v. Fida Hussain*, A.I.R. 1952 Punjab, 224.

4. *Sarat Chandra v. Kanai Lal*, A.I.R. 1921 Cal. 786; 26 C. W.N. 479.

5. *Raja Singh v. Chaichoo Singh*, A.I.R. 1940 Patna 201 : 185 I.C. 816.

agreement is voidable or not. Fraud, undue influence, or coercion makes a contract voidable, and not void. In an application, therefore, under Order 23, Rule 3 of the Code of Civil Procedure, 1908, the Court cannot consider the contract as not a lawful agreement of compromise because one party seeks to avoid it on the ground of fraud, undue influence, or coercion.¹

An interest obtained by undue influence cannot be held by third parties although innocent of fraud. A *bona fide* transferee for value without notice is however protected.² No refundment of money or return of security, given under an agreement not to prosecute a criminal case, will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitute undue influence.³ The principles of justice, equity and good conscience do not necessarily disentitle a mortgagee from insisting on his security for a greater sum than what has been actually advanced. Each case has to be judged according to its own circumstances.⁴ Excessive interest may not be a ground for relief but it may be evidence of the helplessness of the debtor. Where there was no undue influence the Court will not interfere.⁵

For further examples of cases of undue influence see under Section 16, *supra*.

Undue influence and law of limitation.—Article 91 of Schedule I of the Limitation Act, 1908, applied to suits by plaintiffs to have instruments avoided.⁶ The period of three years permitted by Article 91 began to run from the discovery of the plaintiff of the true nature of the deed which he had signed and not from the date when he escaped from the influence by which, according to the plaintiff, he was dominated.⁷ Now see Article 59 of the Schedule to the Limitation Act, 1963.

A defendant may raise undue influence by way of defence and it is not necessary for him to take steps to set aside the agreement.⁸ A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become timebarred. Delay and acquiescence will not bar the defendant's right to equitable relief unless he knew that he had the right, or being a free agent at the time, he deliberately determined not to inquire what his rights were or to act upon them. Where beyond signing the deed the defendant does not do anything to show that he

1. *Harbans Singh v. Bawa Singh*, A.I.R. 1952 Cal. 73; *Western Electric Co. Ltd. v. Kailash Chand*, (1940) Bom. 13; A.I.R. 1940 Bom. 60; *Qadri Jahan Begum v. Fazal Ahmad*, 50 All 748; A.I.R. 1928 All. 494; *Hussain Yar Beg v. Radha Kishan*, 57 All 426; A.I.R. 1935 All 137.

2. *Karunamoyee v. Maya Moyi*, A.I.R. 1948 Cal. 84; *Huguenin v. Baseley* (1806) 14 Vcs. 273.

3. *Amjadnessa v. Rahim Buksh* (1915) 42 Cal. 286.

4. *Hari v. Ramji* (1904) 28 Bom. 371.

5. *Kesavulu v. Arithulai* (1913) 36 Mad. 533.

6. *Lakshmi Doss v. Roop Lal* (F.B.), (1907) 30 Mad. 169, 178; 17 M.L.J. 19.

7. *Someshwar v. Tribhawan*, (1934) 9 Luck. 178 P.C.; A.I.R. 1934 P.C. 130.

8. *Manbhari v. Sri Ram*, (1936) All L.J. 1215; 165 I.C. 240; A.I.R. 1936 All 672.

considered the deed effectual he will not be barred by mere lapse of time from setting up the invalidity of the deed.¹

Where a document has been obtained by practising fraud or undue influence, the legal representatives can bring a suit to set aside the document. A heir of a party to the contract is a person interested in the contract and can sue to set it aside.² Where the executant of a document had no opportunity to have it cancelled on the ground of undue influence, it is open to his representatives to raise the defence of undue influence.³ Section 19A is not confined solely to parties to the contract and hence the option of avoiding a contract procured in any of the ways mentioned in Sections 19 and 19A can be exercised by the party's representatives unless such rights have been lost by the party by acquiescence or otherwise.⁴ The plea of undue influence can be raised only by the executant of document or his representative in estate but not by a third party claiming adversely to such executant.⁵ Under Section 88 of the Indian Trusts Act, the personal representatives of the executor can bring a suit to set aside a document improperly obtained by the person in fiduciary relationship with the executor.⁶

STATE AMENDMENTS

Sections 19B and 19C

Madhya Pradesh

By the Madhya Pradesh Indian Contract (Amendment) Act, 1938,⁷ after Section 19-A of the Indian Contract Act, 1872, the following Sections shall be deemed to be inserted, namely⁸ :—

“19-B. (a) ‘Maintainer’ means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognized by law as justifying his interference.

Definitions of maintainer and champertous agreement.

(b) ‘Champertous agreement’ means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

1. *Lakshmi Doss v. Roop Laul* (F.B.), (1907) 30 Mad. 169, 178; 17 M.L.J. 19; *Rangnath v. Govind*, 28 Bom. 639; 6 Bom. L.R. 592.

2. *Shraavan v. Kashiram*, (1926) 51 Bom. 133; 29 Bom. L.R. 115; 100 I.C. 932; A.I.R. 1927 Bom. 384.

3. *Rash Behari v. Haripada*, 59 C.L.J. 387; 152 I.C. 561; A.I.R. 1934 Cal. 762.

4. *Manbhari v. Sri Ram*, (1936) A.L.J. 1215; 165 I.C. 240; A.I.R. 1936 All. 672; *Shraavan v. Kashiram*, 51 Bom. 133; 100 I.C. 932; 29 Bom. L.R. 115; A.I.R. 1927 Bom. 384.

5. *Kotumal v. Dur Mahomed*, A.I.R. 1931 Sind 78.

6. *Shraavan v. Kashiram* (1926) 51 Bom. 133; 29 Bom. L.R. 115; 100 I.C. 932; A.I.R. 1927 Bom. 384; *Govind v. Savitri* (1918) 43 Bom. 173; 17 I.C. 883; 20 Bom. L.R. 911.

7. This Act has been extended with effect from 1 January, 1959, to the whole of Madhya Pradesh and amended by Section 3 and Schedule of the M. P. Act 23 of 1958.

8. Section 2 of M. P. Act XV of 1938.

19-C. A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose.”

Power to set aside champertous agreement.

The drafting of clause (b) of Section 19-B does not seem to be accurate. A champertous agreement may be an agreement whereby either the nominal plaintiff or the nominal defendant agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained. The expression “or the nominal defendant” seems to have been omitted in clause (b) through oversight, because according to clause (a) of the Section a ‘maintainer’ is a person who gives assistance or encouragement to one of the parties to a suit or proceeding, and this party may either be a plaintiff or a defendant. Even supposing that the Legislature intended to discourage litigiousness on the part of the citizens only as plaintiff and not defence in law as such, though such intention would be lacking in imagination, the common law of the country, namely, the public policy of the law, will come to the rescue of the ‘nominal defendant’ in deserving cases as to which see ‘*Maintenance and champerty*’, under Section 23, *post*.

Champertous agreements are not void *per se* but may be set aside on proper terms. The question whether a champertous agreement should be set aside will depend on the facts and circumstances of each case, and it is not possible to lay down a universal formula which will be applicable in all cases.¹

The words “may be set aside” in Section 19-C are not to give a discretion but to confer a power, and the exercise of such power depends not upon the discretion of a Court or a Judge, but upon the proof of a particular case out of which such power arises. Once an agreement comes within the definition of ‘champertous agreement’ as given in Section 19-B, (b), the Courts will be at liberty to set aside it. The discretion of the Court will be exercised only in imposing the terms and conditions while setting aside the agreement and this discretion has to be exercised judicially.

Where the plaintiff was a maintainer as defined in Section 19-B, and the agreement was champertous, it could not be specifically enforced. The plaintiff was however entitled to compensation.²

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Agreement void where both parties are under mistake as to matter of fact.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

1. *Pannalal v. Thansing*, A.I.R. 1952 Nag. 195.

2. *Passarilal v. Chhuttanbai*, A.I.R. 1958 M.P. 417.

Illustrations

(a) *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) *A* being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Both parties mistaken.—Where both the parties to an agreement are under a common mistake as to a matter of fact essential to the agreement, the agreement is void.

Mistake.—Mistake is a misconception or error.¹ Mistake is not a mere forgetfulness²; it is a slip made not by design, but by mischance. An expectation which is not fulfilled is not a mistake.³

Mistakes in the formation of contracts may be of three kinds, namely, unilateral mistake, mutual mistake, and common mistake. In a case of unilateral mistake only one of the contracting parties is mistaken and the other knows of his mistake. Thus there is no correspondence of proposal and acceptance. In a case of mutual mistake the contracting parties misunderstand each other and here also there is no real correspondence of offer and acceptance. The parties are really not *consensus ad idem* and, strictly speaking, there is in fact no agreement at all. In a case of common mistake both the contracting parties make the same mistake. The minds of the contracting parties are, however, *ad idem* and there comes into being, strictly speaking, an agreement, but it is devoid of force and efficacy because both the parties are mistaken about some fact which is vital to the agreement. Section 20 of the Indian Contract Act deals with the common mistake of fact and not with the mutual or unilateral mistake of fact. As to the effect of mutual and unilateral mistakes see under Section 22, *post*.⁴

A contract where there is no mistake as to its execution is not void.⁵

Section 20 does not apply to a case where the contracting parties have made a mistake as to any fact existing at the time of the making of the contract and it is complained that one of them is unable to carry out its part of the contract on account of the unexpected refusal of a third person to carry out his obligation under another agreement.⁶ Where the defendant was actually aware of the defect in his title which he was conveying to the

1. Wharton : *Law Lexicon*, 14th ed., 1953, 661.

2. *Barrow v. Isaacs*, [1891] 1 Q.B. 417.

3. Wharton : *Law Lexicon*, 14th ed. 1953, 661; *Peria Sami v. Representatives of Salugar* (1878), L.R. 5 I.A. 61, 73.

4. For a mis-statement of the effect of mutual and unilateral mistakes, see *U. P. Govt. v. Nanhoo Mal*, A.I.R. 1960 All. 420, *per* Dwivedi, J., at page 423.

5. *K. M. P. R. Firm v. Ponniah*, A.I.R. 1923 Mad. 17.

6. *U. P. Govt. v. Nanhoo Mal*, A.I.R. 1960 All. 420.

plaintiff at the time of the sale, there was no mutual mistake of facts under Section 20.¹ In *Sheikh Brothers Ltd. v. Ochsner*, [1957] A.C. 136, (on appeal from the Court of Appeal for Eastern Africa), the mistake was as to a matter of fact essential to the agreement, and hence the licence agreement was void under Section 20 of the Indian Contract Act, 1872, and the appellant was not, therefore, entitled to compensation under Section 56 of the Indian Contract Act, 1872.

Common mistake.—In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject-matter of their contract has already perished. Or, the parties may enter into an agreement for the sale of a given picture both thinking that the picture was painted by Poet Rabindra Nath Tagore, whereas in fact it was one by Dr. Abanindra Nath Tagore. This will also be a case of common mistake. In both the cases, the agreement is void. *A* sells to *B* an estate innocently, which at the time is actually swept away by a flood without *A*'s knowledge of the fact. Simply because a conveyance has been executed, and, say, a bond given for the stipulated price, *A* cannot claim the price, because the subject-matter of the sale was not at all there at the time of the contract.²

In the case of common mistake, the mistake does not operate to avoid the contract at the English common law. Only equity can set aside the contract on terms. Even when a contract has been executed it can be set aside in equity on terms on the ground of common mistake. Under Section 20 of the Indian Contract Act an agreement is void where both the parties to it are under a mistake as to a matter of fact essential to the agreement reached. It is not enough that there was a mistake as to some point, even though a material point, a mistake as to which does not affect the substance of the whole consideration.³

In order to render a contract void under Section 20 of the Contract Act the common mistake must be relating to a fact essential to the agreement.⁴

Where the intention of the parties was that the risk should attach in the past and they were ignorant whether the goods were in existence or

1. *Harilal Dalsukhram v. Mulchand*, (1928) 52 Bom. 883.

2. *Hitchcock v. Giddings* (1817), 4 Price 135, 141.

3. *Adaikappa v. Thomas Cook and Son*, A.I.R. 1933 P.C. 78; 64 M.L.J. 184; 142 I.C. 660; *Babshetti v. Venkataramana*, (1879) 3 Bom. 154, 158; *Peria Sami v. Representatives of Salugar* (1878), L.R. 5 I.A. 61, 73; *Chin Gwan and Co. v. Adamji*, (1933) 11 Rang. 201; 146 I.C. 440; A.I.R. 1933 Rang. 79; *Chandanmull v. Clive Mills Co. Ltd.*, (1948) 2 Cal. 297; A.I.R. 1948 Cal. 257; 52 C.W.N. 521; *Kochuward v. Mariappa*, A.I.R. 1954 T.C. 10.

4. *Secretary of State v. Nabi Baksh*, A.I.R. 1927 Oudh 198; *Ismail v. Dattatraya*, (1916) 40 Bom. 638; *Secretary of State v. Sheth Jeshingbhai*, (1893) 17 Bom. 407; *Babshetti v. Venkataramana*, (1879) 3 Bom. 154; *Kuchwar Lime & Stone Co. v. Secretary of State*, (1937) 16 Patna 159; *Debendra v. Administrator-General of Bengal*, (1906) 33 Cal. 713; on appeal, 35 Cal. 955; L.R. 35 I.A. 109; *Sarat Chandra v. Rajoni*, (1908) 12 C.W.N. 481; *Narayan v. Raoji*, (1904) 6 Bom. L.R. 417; *K. Panduranga v. State of Mysore*, A.I.R. 1965 Mys. 244.

destroyed, there was no question of mistakes which would attract Section 20 of the Contract Act.¹

If plaintiff wants to recover the money paid under a mistake of fact, it is necessary for him to establish that the mistake is as to some fact causing a liability to pay. Cash handed over under a voluntary contract hardly comes within that description.²

Where there is a mutual (common) mistake as to a fact which goes to the root of the contract, and frustrates the object of the agreement, Section 20 will apply. But where one of the parties to an agreement knows a fact which makes his bargain an advantageous one, and that fact is unknown to the other party of the agreement, the other remains bound by the contract unless there is an obligation on the party knowing the fact to disclose it to the other party to the contract.³

The existence of a separate warranty in a contract is evidence that the matter of the warranty is not a condition or essential part of the contract, a mistake in regard to which will render the contract void under Section 20 of the Contract Act.⁴

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually was. In a suit on the agreement, it was held that such an error was ground for reforming the account, but not for setting aside the agreement.⁵

Where the notice issued under Section 63(2) of the Calcutta Improvements Acts 1911-1915 and the consequent liability to restriction upon the use of premises constituted a matter of fact essential to an agreement, the case fell within the provisions of Section 20⁶.

Where a compromise had been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the compromise will be set aside.⁷

The Government in granting and the Kalyanpur Company in accepting a lease or a contract for lease were under the impression that the Government had a title to grant such a lease or contract. But as both the parties were under a mutual (common) mistake of fact as to a third person's title the agreement had no binding effect.⁸

Mistakes affecting a contract may be of different kinds and may give rise to different results. The mistake may consist in the expression given

1. *The Indian Trade and General Insurance Co. Ltd. v. Bhailal Maneklal*, A.I.R. 1954 Bom. 148.

2. *Adaikappa v. Thomas Cook & Son (Bankers), Ltd.*, A.I.R. 1933 P.C. 78.

3. *Chin Gwan & Co. v. Adamjee Hajee Dawood & Co.*, A.I.R. 1933 Rangoon 79.

4. *Sada Kavaur v. Tadepally Basaviah*, (1907) 30 Mad. 284.

5. *Seth Gokul Dass v. Murli and Zalim*, (1878) 3 Cal. 602, 608 : 5 I.A. 78, 84.

6. *Nursing Dass v. Chutto Lal*, (1923) 50 Cal. 615.

7. *Bibee Solomon v. Abdool Azeez*, (1881) 6 Cal. 687.

8. *Kuchwar Lime & Stone Company, Ltd. v. Secretary of State*, (1937) 16 Patna 159 (S.B.): A.I.R. 1937 Patna 65.

in a formal document to the real agreement between the parties, in which case the agreement is valid and the remedy is by a rectification. The mistake may be such as to prevent any real agreement being formed in which case the agreement itself is void. Each party may have meant something but not the same thing as the other. There is no *consensus ad idem* and the minds of the parties never met. In such a case, there is no agreement at all. It may also happen that the parties had a common intention which however was based on an assumption made by both of them as to some matter of fact essential to the agreement, such as the existence of the thing which is the subject of the contract. If an assumption of a basic or fundamental character made by the parties to an agreement is erroneous, the agreement is void at its inception, the law regarding such errors as striking at the root of the agreement itself. To hold otherwise would be creating rights and liabilities entirely beyond and outside what was intended by the parties when they entered into the agreement. The same result is reached by implying a term in the contract itself that it was conditional upon the existence of a state of things which can reasonably and properly be described to be basic or fundamental.¹

The question whether the mistake is basic or fundamental depends on the circumstances of each case and on the construction of the particular contract sought to be enforced.²

An overpayment of a second mortgage by the first mortgagee, due to a mistake as to the state of account between the first mortgagee and the mortgagor, is a mistake "as between" the two mortgagees which will found a claim for money had and received.³

Common mistake as to essential fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. *A* agrees to sell to *B* a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.⁴ *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. *A* being entitled to an estate for the life of *B*, agrees to sell it to *C*. *B* was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.⁵

1. *Ramanujulu v. Gajaraja*, A.I.R. 1950 Mad. 146; *Norwich Union Fire Insurance Society v. Price, Ltd.*, [1934] A.C. 455; A.I.R. 1934 P.C. 171; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154; 110 L.J. K.B. 433.

2. *Ramanujulu v. Gajaraja*, A.I.R. 1950 Mad. 146; *Secretary of State v. Nabi Bakhsh*, A.I.R. 1927 Oudh 198.

3. *Weld-Blundell v. Synott*, [1940] 2 K.B. 107.

4. *Couturier v. Hastie* (1856), 5 H.L.C. 673; 101 R.R. 329.

5. *Strickland v. Turner* (1852), 7 Ex. 208; 86 R.R. 619; *Cochrane v. Willis* (1865), L.R. 1 Ch. 58.

The Explanation to Section 20 makes it clear that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.¹ As to the effect of one-sided mistake as to matter of fact, see Section 22, *post*. As to the effect of mistakes as to law, see Section 21, *post*.

Effect of common mistake.—Where both the parties are mistaken as to the essential fact, the agreement is void. Where only one of the parties is mistaken as to a matter of fact, the contract is not void; it is not even necessarily voidable. See Section 22, *post*. As to effect of mistakes as to law, see Section 21, *post*.

When a contract is void, it means that the instrument or transaction is so nugatory and ineffectual that nothing can cure it. Acceptance of rent, for example, will not affirm a void lease. In a void agreement no legal contract ever comes into being and so the rights of the parties are determined independently of the deed where any. There is no need to avoid or cancel that which never existed in the eye of the law.²

In the case of common mistake, formally there is correspondence of proposal and acceptance, but where the parties are both mistaken about some fundamental fact their mistake will be fatal to the existence of the contract. Thus, where in the case of common mistake the particular subject-matter of the agreement is in fact non-existent, the agreement reached though complete in its form cannot have efficacy. The contract in such a case is therefore void, that is, without any legal significance.³

In the case of common mistake, the parties are of one mind, though the agreement is later discovered as to have no content at all or to have been based on an assumption which was taken to be fundamental by both the parties but has proved false. The proof of common mistake excludes intention. The common mistake relied on by a party should however be of such a nature that it can properly be described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.⁴ Where a mistake or misrepresentation has been there as to some facts which facts by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract, such a mistake common to both parties is, if proved, sufficient to render a contract void.⁵ The underlying assumption can only properly relate to something which

1. *Harilal v. Mulchand*, (1928) 52 Bom. 883 : 113 I.C. 29 : A.I.R. 1928 Bom. 427 ; *Secretary of State v. Yellepeddi*, A.I.R. 1925 Mad. 859 : 87 I.C. 644 ; *Soorath v. Bhabasankar*, 119 I.C. 205 : (1928) 33 C.W.N. 626 : A.I.R. 1929 Cal. 547.

2. *Asaram v. Ludheshwar*, (F.B.), A.I.R. 1938 Nag. 335 ; *Petherpermal v. Muniandy*, 35 Cal. 551 P.C. ; *Husen v. Rajaram*, A.I.R. 1914 Nag. 75.

3. *Couturier v. Hastie*, (1856) 5 H.L. Cas. 673 ; *Strickland v. Turner*, (1852) 7 Exch. 208 ; *Galloway v. Galloway*, (1914), 30 T.L.R. 531.

4. *Norwich Union Fire Insurance Society, Ltd. v. Price Ltd.*, [1934] A.C. 455, 463.

5. *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161, 206, 218, 235.

both the parties must necessarily have accepted in their minds as an essential and integral element of the subject-matter. This underlying assumption may also relate to quality of the thing contracted for. In such a case a mistake will affect assent where it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. This is one line of thought. This line seeks to imply that a contract will be void if the parties proceed on a false and a fundamental assumption irrespective of the character of the fact assumed to be true. There is, on the other hand, the restrictive view holding that the only false assumption sufficiently fundamental to rank as operative mistake is the assumption that the very subject-matter of the contract is in existence.¹ This latter view represents the English common law on the subject, namely, that a common mistake though fundamental does not as a general principle nullify a contract at common law. According to the English common law, a contract is not void merely because the parties acted under a common mistake, however fundamental that mistake may be.² It is only where the subject-matter of the contract is not in existence at the time of the agreement or the subject-matter has already been the property of the buyer or transferee himself at the time of the sale or transfer that the agreement is void under the English common law. When goods, for example, whether specific or unascertained, are sold under a known trade description without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is completely irrelevant. The parties are bound by their contract, and there is no room for the doctrine that the contract can be treated as a nullity on the ground of common mistake, even though the mistake from the point of view of the purchaser may turn out to be of a fundamental character.³ Thus even where both the parties were under a mistake and the said mistake was of a fundamental character with regard to the subject-matter, but nevertheless to all outward appearances were agreed with quite sufficient certainty on a contract for the sale of goods by description, the contract was not treated in the eye of the common law of England as a nullity. The common mistake prevalent in the minds of the parties but not reflected in the contract itself did not vitiate the contract under the English common law, though in equity such a mistake might in some circumstances be a ground for setting aside the contract in question.⁴

1. See Cheshire and Fifoot; *Law of Contract*, 4th edn., 1956, 172-179; *ibid.*, 5th edn., 1960, 174-185; and 6th edn., 1964, 187-202. *Solle v. Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107; *Leaf v. International Galleries*, [1950] 2 K.B. 86; [1950] 1 All E.R. 693; *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161.

2. See Cheshire and Fifoot, *Law of Contract*, 5th edn., 1960, 184; 6th edn., 1964, 198.

3. *Harrison and Jones, Ltd. v. Bunten and Lancaster, Ltd.*, [1953] 1 Q.B. 646; [1953] 1 All E.R. 903.

4. *Frederick E. Rose (London), Ltd. v. William H. Pim, Jur. & Co., Ltd.*, [1953] 2 Q.B. 450; [1953] 2 All E.R. 739.

The scope and effect at common law of common mistake on a contract have been discussed by the House of Lords in *Bell v. Lever*, [1932] A.C. 161. In *Solle v. Butcher*, [1950] 1 K.B. 671, Denning, L.J., had had the view that a contract would not be void if based on a false and fundamental assumption of any character. It would be void, according to Denning, L.J., only if the subject-matter was non-existent. Irrespective of this view of Denning, L.J., a contract, in England, even though not void at common law for common mistake, may be set aside in equity upon such terms as seem fit to the Court.¹

Under the English common law, where the basis upon which the contract had been entered into had had no existence, the contract will be set aside. Such a case of contract is known as the case of *res extincta*.² Where a party has nothing to assign, transfer, sell, or convey, the assignment, transfer, sale, or conveyance is a nullity. Through a common mistake an agreement may also be made for transfer, assignment, lease, or sale of a property in favour of a person where in fact the transferee, assignee, lessee, or the purchaser himself was in law the owner of the thing conveyed, and thus there was nothing for the other party to convey. This last case of contract is known as the case of *res sua*.³ The existence of the subject-matter of the contract is as essential as the existence of the parties thereto.⁴ This restrictive view of the English common law as to the operativeness of common mistake does not however bar in England the application of the equitable principles of relief to deserving cases. Equity may set aside a contract based on a common mistake even where the said common mistake is not of a fundamental character. Equity may also rectify a written agreement where the writing has failed to record accurately the agreement that was sought to be made by the parties *inter se*. Equity like common law regards the cases of the *res extincta* and the *res sua* as nullity.

Under equity the void contract may be refused specific performance. It may also be set aside even after it has been executed. Ancillary relief may also be granted to either of the parties if the circumstances of the case so require.⁵ When once the Court finds that an agreement was reached as between the parties who had been under a common mistake of a material fact, the Court may set the contract aside, and it has ample jurisdiction to set aside even an order of the Court which was founded upon that contract.⁶ In its equity jurisdiction, the Court may set aside a contract even when it is not void on the ground of common mistake.⁷ Where parties have

1. *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273.

2. *Scott v. Coulson*, [1903] 2 Ch. 249, 253.

3. *Bingham v. Bingham*, (1748) 1 Vcs. Sen. 126; *Cochrane v. Willis*, (1865) 1 Ch. App. 58; *Debenham v. Sawbridge*, [1901] 2 Ch. 98, 109.

4. *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161, 218; *Newborne v. Sensolid (Great Britain), Ltd.*, [1954] 1 Q.B. 45; (1953) 1 All E.R. 708.

5. *Cooper v. Phibbs*, (1867), L.R. 2 H.L. 149.

6. *Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd.*, [1895] 2 Ch. 273, 284.

7. *Solle v. Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107.

reached final agreement upon the terms of a contract but, owing to common mistake, these terms are inaccurately expressed in a later instrument, the Court may not only rectify the instrument but also decree specific performance of it as rectified.¹ The Court of equity also seeks to do justice to third parties where their interests have meanwhile intervened,² though under the English common law relief could not be given to a third party where the contract in question was void because of common mistake.³

Section 20 of the Indian Contract Act embodies the English equitable rules of common mistake. The illustrations to the Section however confine themselves only to cases of the *res extincta*.

There is difference between a mistake as to an existing fact and a mistake as to a future occurrence with distinct consequence. A mistake as to an existing fact will render the contract void *ab initio*, that is, if the parties have entered into a contract upon such a mistake there is and never has been any contract at all between them. On the other hand, if the mistake is as to some future event, a binding contract is entered into between the parties. The contract may be avoided or rescinded at some future date if the expected event does or does not happen. Thus in case of mistakes as to a future fact the contract would not be void *ab initio*.⁴

Where a consignee has entered into a contract of sale of goods with a third person but before the sale and without the knowledge of the vendor the goods are stolen in transit, the contract of sale is void on account of bilateral (common) mistake.⁵ If parties contract under a mutual (common) mistake and misapprehension as to their relative and respective rights, the result is that the agreement is void.⁶ The Government of Bihar represented to a Lime Co. the plaintiff that it had the right to forfeit the lease of one Kuchwar Co. and grant a lease to the plaintiff, and the plaintiff believing in that representation entered into a contract with the Government. But as a result of the decision of the Privy Council the Government became incapable of making out the title which it asserted it had at the time of the contract. The title of the Government was not however wholly gone but was restricted only by reason of the earlier lease which had still several years to run. It was held that in the circumstances it had been open to the plaintiff to repudiate the contract if he so liked, but the Government could certainly not plead that the contract was void on the ground of mistake and refuse to perform that part of the agreement which it was possible for it to perform.⁷ In a written agreement by a debtor to pay his debt by instal-

1. *Craddock Brothers v. Hunt*, [1923] 2 Ch. 136.

2. *Huddersfield v. Henry Lister*, [1895] 2 Ch. 273.

3. *Cundy v. Lindsay*, (1878) 3 App. Cas. 459.

4. *Chandanmull v. Clive Mills Co. Ltd.*, A.I.R. 1948 Cal 257.

5. *Governor-General in Council v. Kahir Ram*, A.I.R. 1948 Patna 345.

6. *Kuchwar Lime & Stone Co., Ltd. v. Secretary of State*, (S.B.), (1937) 16 Patna 159 : A.I.R. 1937 Patna 65 ; *K. Panduranga v. State of Mysore*, A.I.R. 1965 Mys. 244.

7. *Kalyanpur Lime Works, Ltd. v. State of Bihar*, A.I.R. 1954 S.C. 165 ; (*Dalmia Jain & Co. Ltd. v. Kalyanpore Lime Works, Ltd.*, A.I.R. 1952 Patna 393 reversed.)

ments, securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually was. In a suit on the agreement it was held that the error in question was ground for reforming the account, but not for setting aside the agreement.¹

One fundamental distinction between Section 20 of the Contract Act and Section 55 of the Transfer of Property Act, consists in whether both parties to the contract to sell or the seller alone have or has knowledge of a defect in the property sold, for while in the former case the ignorance of the parties is not dishonest, in the latter, the element of fraud necessarily intervenes and it is for this reason that Section 55 of the Transfer of Property Act expressly declares the conduct of the seller to be fraudulent when he fails to disclose to the buyer a material defect in the property. Consequently, reasoning under Section 20 of the Contract Act cannot be used in support of a reasoning under Section 55 of the Transfer of Property Act.²

The parties were contemplating sale of a plot of land under the impression that it was five bighas, while as a matter of fact the area was less. According to the municipal rules the plaintiff would not be entitled to build on the land, the area being less than five bighas. The case was one of a (common) mistake as to a matter of fact essential to the agreement, and as such the agreement was void under Section 20 of the Contract Act and not enforceable in law.³

Where the party assailing the contract does not suggest that it was vitiated by mutual (common) mistake but alleges that he was labouring under mistake as to the nature of the work to be done under the contract that would not, as is clear from Section 22, entitle him to avoid the contract.⁴

If a compromise were void under Section 20 the order passed on the basis thereof will be wrong or incorrect to be rectified in appropriate proceedings but it will not amount to an order without jurisdiction.⁵

Mutual (common) mistake such as would render a contract void within the meaning of Section 20 depends upon facts which must be pleaded and proved. Where the plea is not made out either in the plaint or at the hearing before the trial Court, it cannot be raised for the first time in appeal.⁶

Rectification of written agreements.—Cases arise where a document purporting to embody the terms of a contract fails to state them accurately. It may thus reveal a mis-statement, understatement, or overstatement of the content of the contract sought to be made. A court of equity in England when moved will rectify the document in question only on the ground of

1. *Seth Gokul Dass v. Murli*, (1878) 3 Cal. 602.

2. *Jodha Mal v. Associated Hotels of India*, A.I.R. 1950 Lah. 106.

3. *Henry Earnest Meaney v. Eyre Walker*, A.I.R. 1947 All. 332.

4. *Namayya v. Union of India*, A.I.R. 1958 Andhra 533.

5. *Krishna v. Dhanapati*, A.I.R. 1957 Cal. 59.

6. *Jyoti Prasad v. Henry Seddon*, A.I.R. 1940 Patna 516.

common mistake¹ and will also, when necessary, order specific performance of the agreement as embodied in the rectified document.²

As to the right of a party to resist specific performance of a contract on the ground of mistake, see Specific Relief Act, 1963, Sections 9 and 18. As to the law of rectification of instruments in India, see Section 26 of the Specific Relief Act, 1963. As to the law of cancellation of instruments in India, see Sections 31 to 33, *ibid*.

"In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties—into their intentions—any more than one does in the formation of any other contract. One looks at their outward acts, that is, what they said or wrote to one another in coming to their agreement, and then compares it with the document which they have signed. If one can predict with certainty what the contract was and that it is, by a common mistake, wrongly expressed in the document, then one rectifies the document but nothing less will suffice."³ A party is entitled to rectification of a contract if he proves beyond a reasonable doubt that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included.⁴

Contracts may be rectified so as to carry out the intentions of the contracting parties where they have been drawn up, by reason of a common mistake, to an effect militating against the intentions of both.⁵

The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential.⁶ In order to enable the Court to

1. *Breadalbane v. Chandos* (1837), 2 My & Cr, 711, 740; *Rooke v. Kensington*, (1856) 2 K. & J 753; *Smith v. Iliffe*, (1875) L.R. 20 Eq. 666; *Tucker v. Bennett*, (1887) 38 Ch. D. 1, 9, 15; *Bonhote v. Henderson*, [1895] 1 Ch. 742, *affd.* [1895] 2 Ch. 202; *Higgins (W.) Ltd. v. Northampton Corporation*, [1927] 1 Ch. 128; *Fredensen v. Rothschild*, [1941] 1 All E.R. 430.

2. *Craddock Brothers, Ltd. v. Hunt*, [1923] 2 Ch. 136; *United States v. Motor Trucks, Ltd.*, [1924] A.C. 196; *Shipley U.D.C. v. Bradford Corporation*, [1936] Ch. 375.

3. *Frederick E. Rose (London), Ltd. v. William H. Pim & Co., Ltd.*, [1953] 2 Q.B. 450, 461; [1953] 2 All E.R. 739, 747; *Madhavji Bhanji v. Ramnath Dadoba*, (1906) 30 Bom. 457; *Fowler v. Fowler*, (1859) 4 D. & J. 250, 264; *Haji Abdul Rahman v. Bombay and Persia Steam Navigation Co.*, (1892) 16 Bom. 561; *U Shwe Thaung v. U Kyaw Dun*, 125 I.C. 259: A.I.R. 1930 Rang. 12.

4. *A. Roberts & Co. Ltd. v. Leicestershire County Council*, [1961] 2 W.L.R. 1000.

5. *Beale v. Kyle*, [1907] 1 Ch. 654.

6. *Lovell and Christmas, Ltd. v. Wall*, (1911) 104 L.T. 85.

rectify a faulty document, there must be evidence of an agreement whether made orally or in a written form clearly expressing the intention of the parties. Without the basis of this earlier oral or written agreement, the Court will not be in a position to rectify the faulty document which subsequently sought to embody the intention of the parties by way of restatement. The earlier agreement whether oral or written must have been the final, express, and conclusive embodiment of the intention of the parties. Without the basis of such an embodiment of the intention of the parties the Court will have nothing wherewith to judge as to the mis-statement, understatement, or overstatement of the content of the real contract alleged to have been faultily incorporated in the document sought to be rectified. The earlier agreement must evince the completion of a contract, though for the want of a written or proper form, seal, stamp, or registration it could not be enforced in a Court of law. What is essential is the completion of an agreement as between the parties.¹ The later document must be only a more formal expression of the terms earlier concluded. When the parties did not or could not finally reach any agreement as to the terms of a contract whether orally or by means of an agreement, note, or memorandum prior to the document written subsequently, the Court will naturally construe that the document written subsequently is the only and accurate exposition of the terms of the contract finally reached. The question of rectification in such a case does not therefore arise.²

21. A contract is not voidable because it was caused by a mistake as to any law in force in India, but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation ; the contract is not voidable.

Mistake of law.—A mistake of law is no ground for relief from a transaction. A mistake of law is not a mistake that invalidates an agreement.³ A contract is not voidable because it was caused by a mistake as to any law in force in the country. *A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. The contract is not voidable. A mistake as to foreign law has however the same effect as a mistake of fact. A mistake as to the law in force in India does not make a contract voidable. A man cannot go back upon what he has deliberately done merely because he alleges that he acted under a misapprehension of the law.*⁴

1. *Shipley U.D.C. v. Bradford Corporation*, [1936] Ch. 375 ; *Crane v. Hageman-Harris Co. Inc.*, [1939] 1 All E.R. 662.

2. *Breadalbane v. Chandos* (1837), 2 Mv. & Cr. 711 ; *Fowler v. Fowler* (1859), 4 De. G. & J. 250.

3. *Ghansiram v. Girijashankar*, A.I.R. 1944 Nagpur 247.

4. *Jowand Singh v. Sawan Singh*, A.I.R. 1933 Lah 836.

The English rule that money paid under a mistake of law is not recoverable, was reaffirmed in *Sawyer & Vincent v. Window Brace, Ltd.*, [1943] K. B. 32; *Fibrosa Spolka v. Fairbairn Lawson*, [1943] A. C. 32; *Jones, Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670. In India, however, mistake of law only does not invalidate an agreement; money paid under a mistake of law is not irrecoverable. Entering into a contract under a mistake of law has been, in India, distinguished from making a payment of money under a mistake of law. See Section 72, *post*.

A mistake of law, whether unilateral, mutual, or common, has no effect in the matter of rendering a contract voidable.¹ Where a mistake is a pure mistake of law in India and not a mistake bearing upon the private or special right of the person and where such mistake results in the payment by one person to another making it inequitable that the payee should retain the money, such a mistake is no ground of relief within Section 72 of the Contract Act.²

Under Section 21, error of law does not vitiate a contract, much less will it annul a conveyance after the lapse of many years, unless there has been some fraud or misrepresentation and an absence of negligence.³

In the maxim *ignorantia juris haud excusat*, the word 'jus' is used in the sense of denoting general law—the ordinary law of the country. But when 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that agreement is liable to be set aside as having proceeded upon a common mistake.⁴

Like most maxims of the law, the maxim that ignorance of law does not furnish an excuse or defence has but a limited application and it is not proper to fetter the law by maxims of this kind. If the mistake of law, which is common to both the parties to an agreement, is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said that as the combined effect of the parties' view of the law and the facts, they made a mistake at the time of entering into the transaction as to the nature of their pre-existing private rights it may be said that such a mistake is not a pure mistake of law and the agreement is liable to be set aside as having proceeded upon a common mistake.⁵

Where under an earlier decision *A* would have succeeded and under a

1. *British Homophone, Ltd. v. Kunz and Crystallite Gramophone Record Manufacturing Co., Ltd.*, (1935) 152 L.T. 589; *Sabihan Bibi v. Madho Lal*, (1907) All W.N. 197.

2. *Appavoo v. S. I. Ry. Co.*, A.I.R. 1929 Mad. 177.

3. *Vishnushankaram v. Kashinath*, (1887) 11 Bom. 174.

4. *Cooper v. Phibbs*, L.R. 2 H.L. 149, 170; Stroud: *Judicial Dictionary*, 3rd ed., vol. 2, 1545.

5. *Ramanujulu v. Gajaraja*, A.I.R. 1950 Mad. 146; *Cooper v. Phibbs*, (1867) 2 H.L. 149; 16 L.T. 678; *Pratapa Simha v. Simji Raja Saheb*, A.I.R. 1927 Mad. 150; *Ramchandra v. Ganesh Chandra*, (1917) 21 C.W.N. 404; 39 I.C. 78.

later decision which overruled the earlier decision *B* would have succeeded as heir to the suit properties, and between the dates of these two decisions *A* sold the suit properties to *B* the price being paid by the execution of the suit mortgage by *B* to *A* for the full amount of the consideration and the sale and the mortgage formed the consideration the one for the other: it was held that as judicial decisions, unlike enactments of the Legislature, are merely declaratory of the law as it has always stood even at the time of the sale and the mortgage, *A* had, in fact, no title to convey though the parties had assumed the contrary. The contract related to a subject-matter contemplated by the parties as existing but which in the fact did not exist. As *B* was purporting to take a conveyance of her own property not knowing that it was hers there had been a total failure of the subject-matter of the transaction. The result in law was the same as if the parties had made an agreement expressly conditional on the existence of a good title in the vendor, which not existing, the agreement fell with the title and as the mortgage and the sale both formed parts of the same transaction, each being the consideration for the other, they were both unenforceable.¹

The mistake with regard to the law of registration upon the validity of the assignment deed would be a mistake of law and under Section 21, the contract would not be void on that ground.²

The members of the co-operative society, so far as their liability was concerned, under the impression that their individual property could be sold in execution of a decree against the society entered into compromise with the decreeholder-bank whereby the bank gave up its rights to have the question of liability of the members decided by the Civil Court and also gave up a portion of its claim. By a subsequent decision of the High Court it was established that the individual property of the members of the society was not liable in execution of a decree against the society. It was held that the members could not assert their right which they had given up and which was subsequently found that they had in contravention of the terms of the compromise.

An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other and therefore the compromise of a doubtful right is a sufficient formation of an agreement. If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim even if he turns out to be wrong. It is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence. Thus the reality of the claim which is

1. *Ramanujulu v. Gajaraja*, A.I.R. 1950 Mad. 146.

2. *Kalyanpur Lime Works, Ltd. v. State of Bihar*, A.I.R. 1954 S.C. 165.

given up must be measured, not by the state of law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise, one would have to try the whole cause to know if the man had a right to compromise it and with regard to questions of law it is obvious one could never safely compromise a question of law at all.¹

Where a certain property is included in a partition under a mistaken view that the co-sharers were entitled to inherit it and it is later claimed by the lawful heir, the partition can be set aside and shares re-adjusted as private right of ownership is a matter of fact though it may be the result of law and the parties were under a mutual mistake and misapprehension as regards their respective and relative rights in effecting the partition.²

Section 21 of the Indian Contract Act deals only with mistakes of law which cause a contract or which give birth to a contract; it has nothing to do with any other kind of mistake. If therefore a payment made under a mistake of law is not the origin of a contract such payment would be refundable under Section 72. The English common law rule that a payment made under a mistake of law is not recoverable has no application in India where there is a statute governing the question.³

Where the legal position was well known to all concerned in the locality, it could not be said that either party was under a misconception as to the rights to be created.⁴

22. A contract is not voidable merely because it was caused

Contract not voidable merely because of mistake of one party as to matter of fact. by one of the parties to it being under a mistake as to a matter of fact.

One party mistaken as to matter of fact.—A contract is not necessarily voidable because it was caused by one of the parties under a mistake as to a matter of fact.⁵ Under Section 20, an agreement is void where both the parties to it are under a mistake as to a matter of fact essential to the agreement. Under Section 21, a contract is not voidable because it was caused by a mistake as to any law of the country. A mistake as to a law not in force in India, that is, a foreign law, is treated, under Section 21, as a mistake of fact.

Section 22 of the Contract Act covers cases of mutual as well as unilateral mistakes. In some of the judicial decisions the expression 'mutual mistake'

1. *Central Co-operative Bank, Ltd. v. Dasrath Pandey*, A.I.R. 1940 Patna 406; *Miles v. New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266; 55 L.J. Ch. 801; 54 L.T. 582; 34 W.R. 669; *Sadasiva v. Ramalinga*, 2 I.A. 219; 24 W.R. 193; 15 Beng. L.R. 383; 3 Sar. 519 (P. C.); *Stapilton v. Stapilton*, 1 *White and Tudor's Leading Cases*, 234; *Cann v. Cann*, 24 E.R. 586.

2. *Cooper v. Phibbs* (1867), 2 H.L. 149; *Ramchandra v. Ganesh Chandra*, A.I.R. 1917 Cal. 786; *Balaji Ganoba v. Annapurnabai*, A.I.R. 1952 Nag. 2.

3. *Jagadish Prosad v. Produce Exchange Corporation Ltd.*, A.I.R. 1946 Cal. 245.

4. *State of Orissa v. Md. Khan*, A.I.R. 1961 Orissa 75.

5. *Dayabhai v. Lakhmichand*, (1885) 9 Bom. 358.

has been used for 'common mistake'. In the context of a given fact-situation it will not be difficult, it is believed, to follow the *referent*.

Mutual mistake.—In mutual mistake, the parties misunderstand each other and are at cross-purposes. *A* intends to offer his 8 horse-power Standard car for sale, but *B* believes that the offer relates to one Hindustan of 10 horse-power. Or, *A* intends to sell a painting by Dr. Abanindranath Tagore, but *B* believes that the offer relates to a painting by Poet Tagore. In both the cases the mistake is mutual and not common.

In both the cases *A* is ignorant of *B*'s erroneous belief and hence the mistake involved is called mutual. If however *A* was aware of *B*'s erroneous belief, the mistake in either case would be called unilateral.

In the case of mutual or unilateral mistake because of the lack of one-mindedness an agreement cannot be said to have been reached. The law however does not always hold a contract voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

There is a distinction between the intention of the parties and the sense of the promise, and it is the sense of the promise rather than the intention of the parties which governs the contract. Of course, the sense of the promise may be different to different persons; the promisor may consider that his words bear one sense, the promisee may consider that they bear another, and a stranger may consider that they bear a third. But the judge, who has to decide what legal obligation has resulted from the transaction, determines what the sense is. If, after an examination of all the evidence, ambiguities remain unresolved and the judge finds himself unable to determine the "sense of the promise", he will conclude that no binding contract has been made.¹ There may be cases of contract entered into under mutual mistake where because of the extent of the absence of one-mindedness as between the parties it is not possible for the Court at all to interpret the facts in favour of a concluded contract.²

Mutual mistake does not as a rule vitiate a contract. This is the position even under equity.³ Where there has been no misrepresentation and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law, the performance of a contract could seldom be enforced upon an unwilling party who was also unscrupulous.⁴ Thus, the content of a contract is ordinarily construed according to the ordinary and accepted meaning of the words employed by the parties

1. *Cheshire and Fifoot, Cases on the Law of Contract*, 3rd edn. 1959, 117-118; *Scott v. Little Dale* (1858), 8 E. & B. 815; *Raffles v. Wichelhaus* (1884), 2 H. & C. 906; *Scriven Brothers & Co. v. Hindley & Co.*, [1913] 3 K. B. 564.

2. *Scriven Brothers & Co. v. Hindley & Co.*, [1913] 3 K.B. 564; *Raffles v. Wichelhaus* (1864), 2 H. & C. 906.

3. *Preston v. Luck* (1884), 27 Ch.D. 497.

4. *Tamplin v. James* (1880), 15 Ch.D. 215; *Van Praagh v. Everidge*, [1902] 2 Ch. 266.

in order to convey the terms purported to be agreed upon.¹ A court of equity, however, may also, in its discretion refuse specific performance of a contract against the mistaken party. Courts of equity have at all times relieved against honest mistakes in contracts, when the literal effect and the specific performance of them would be to impose a burden not contemplated and which it would be against all reason and justice to fix upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to either party.²

In the case of a contract entered into under mutual mistake, the law resorts to somewhat an objective standard. Even in the absence of one-mindedness as between the parties, the law will try to interpret as if there had actually been correspondence of offer and acceptance. Whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.³ Where the nature of a given right was well known in the locality, the law will not conclude that there was any common or mutual mistake as to such right.⁴ In *Haji Abdul Rahman v. Bombay & Persia Steam Navigation Company*, (1892) 16 Bom. 561, the plaintiff chartered a steamer from the defendants. The date inserted in the charter-party was the 10th August, 1892 (fifteen days after the Haj). "The 10th August, 1892", was given or accepted by the plaintiff in the belief that it corresponded with the fifteenth day after the Haj. The defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the Haj. On finding out the mistake the plaintiff brought a suit for rectification of the charter-party by the insertion of the correct date, the 19th July, 1892, instead of the erroneous date, the 10th August, 1892. It was held that the agreement was one for the 10th August, 1892, and that as that date was a matter materially inducing the agreement there could be no rectification but only cancellation, even if both parties were under a mistake. The mistake was not mutual (meaning, common) but on the plaintiff's part only; and, therefore, there could be no rectification.

Unilateral mistake.—In unilateral mistake, one only of the parties is mistaken. There is no common misconception or error. The other party

1. *Powel v. Smith* (1872), L.R. 14 Eq. 85; *Watson v. Marston* (1853), 4 De G. M. & G. 230, 238.

2. *Burrow v. Scammell* (1881), 19 Ch.D. 175, 182; *Paget v. Marshall* (1884), 28 Ch.D. 255, 263, 266.

3. *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, 607; *Cornish v. Abington* (1859), 4 H. & N. 549, 556; *Wood v. Scarth* (1858), 1 F. & F. 293; *Scott v. Littledale* (1858), 8 E. & B. 815.

4. *State of Orissa v. Md. Khan*, A.I.R. 1961 Orissa 75.

knows, in case of unilateral mistake, or must be taken to know, of the former's mistake. If, for example, *A* agrees to buy from *B* a specific picture which *A* believes to be a genuine one of Poet Tagore's but which in fact is a copy and *B* knows of *A*'s erroneous belief, then the case will be of unilateral mistake. But if *B* is ignorant of *A*'s erroneous belief, it will be a case of mutual mistake.

In the case of mutual or unilateral mistake because of the lack of one-mindedness an agreement cannot be said to have been reached. Unlike in the case of common mistake, in the case of mutual or unilateral mistake there has been no correspondence of proposal and acceptance.

If an offer made in one sense by the offeror is mistakenly accepted in another sense by the offeree and if the mistake is known or ought to be known to the offeror, no contract is created by the acceptance. But if an offer is accepted in the sense intended by the offeror, the fact that the acceptance is due to a mistaken motive does not prevent the formation of a contract.¹

An agreement apparently concluded between *A* and *B* is a nullity on the ground of mistaken identity, if it is proved that *A* did not intend to contract with *B* but with *C*, that this fact was known, actually or inferentially, to *B* and that the question of identity was an essential element in the transaction.²

If *A*, though misled, intends to contract with *B*, the contract cannot be void on the ground of mistaken identity. It is a question of fact in each case what *A*'s intention was, and the onus lies on *A* to prove that he did not intend to contract with *B*, but with *C*, that this mistake was known to *B*, and that the question of identity was an essential element in the transaction.³

A person may escape liability on a document which he has signed if he has been misled as to its fundamental character, but not if he has been misled merely as to its details. The plea of mistake is available to a person despite his negligence, unless the document which he has signed in the belief that it was one of a different category is a negotiable instrument that has come into the hands of an innocent assignee for value.⁴

A buys *B*'s horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known that the horse was unsound. If *B* has made no representation as to soundness and has not contracted that the horse is sound, *A* is bound and cannot recover the price. *A* agrees to take on lease or to buy from *B* an unfurnished dwelling house. The house is in fact uninhabitable. *A* would never have entered into the bargain if he had known the fact. *A* has no remedy and the position is the same whether *B* knew the facts or not, so long as he

1. *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; *Hartog v. Colin and Shields*, [1939] 3 All E.R. 566.

2. *Lindsay v. Cundy* (1876), 1 Q.B.D. 348; *Cundy v. Lindsay*, (1878), 3 App. Cas. 459.

3. *Phillips v. Brooks, Ltd.*, [1919] 2 K.B. 243.

4. *Foster v. Mackinnon* (1869), L.R. 4 C.P. 704; *Carlisle and Cumberland Banking Company v. Bragg*, [1911] 1 K.B. 489.

made no representation or gave no warranty. *A* buys a roadside garage business from *B* abutting on a public thoroughfare; unknown to *A* but known to *B*, it has already been decided to construct a bye-pass road which will divert substantially the whole of the traffic from passing *A*'s garage. *A* has no remedy. All these cases involve hardship on *A* and benefit to *B*. But the cases are supported on the ground that it is of paramount importance that contracts should be observed. Where parties honestly comply with the essentials of the formation of contracts, that is, where they agree in the same terms on the same subject-matter they are bound by the contracts made by them.¹ Where however an agreement is vitiated by a unilateral mistake the law will intervene in favour of the party aggrieved. Thus if in the above instances *B* knew that *A* had completely misunderstood the offer and yet allowed him to proceed with the negotiations and accept the offer, law would intervene to the relief of *A*. If by any means *B* knew that there was no real agreement between him and *A*, he would not be entitled to insist that the agreement should be fulfilled in a sense to which the mind of *A* did not assent.² Where the mistake does not concern the fundamental character of the offer or acceptance it will not vitiate the agreement even though there has not been one-mindedness between the parties. The character of the offer or the character of the acceptance may properly relate to the subject-matter of the contract as well as the personality of the proposer and the offeree.³ For English cases as to effect of mistaken identity of personality see *Boulton v. Jones* (1857), 2 H. and N. 564 : 27 L.J. (Ex.) 117; *Hardman v. Booth* (1863), 1 H. and C. 803; *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *Sowler v. Potter* [1940] 1 K.B. 271 : [1939] 4 All E.R. 478; *King's Norton Metal Co., Ltd. v. Edridge, Merret and Co., Ltd.*, (1897), 14 T.L.R. 98; *Phillips v. Brooks, Ltd.*, [1919] 2 K.B. 243; *Dennant v. Skinner & Collam*, [1948] 2 K.B. 164 : [1948] 2 All E.R. 29.

A mistake is immaterial under the English common law unless it results in a complete difference in substance between what the mistaken party bargained for and what in fact he will obtain if the contract is fulfilled. Where the mistake does not prevent the mistaken party from appreciating the fundamental character of the offer or the acceptance it will not be material. Where a particular proposal has been made without any representation or warranty and accepted by the offeree according to the terms proposed by the proposer, the acceptance will result in a binding agreement irrespective of the motive with which the offeree accepted the proposal.

It is with a great many qualifications that it can be said that at English common law as in equity a unilateral mistake will vitiate the contract. A court of equity only in certain circumstances will either set such a contract

1. *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161, 224.

2. *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, 609, 610.

3. *Jagannath v. Secretary of State*, (1886) *Punj. Rec.*, No. 21.

aside or refuse to order its specific performance,¹ In deserving cases, equity will, in a case of unilateral mistake, even where the mistake does not at English common law avail the mistaken party in view of its not being material to the substance of the offer, grant relief to the mistaken party where the sense of justice so demands.²

As in the case of mutual mistake so in the case of unilateral mistake, the application of the objective standard is not ruled out. A party is presumed in law to have known what would be obvious to a reasonable man in given circumstances. The party seeking to benefit under the unilateral mistake cannot thus plead his ignorance as to the other party's mistake where the custom of the trade and such other circumstances were sufficient in the eye of the law, to establish that as a reasonable man the former should have known that the latter had been working under a mistake.³

Money paid under a mistake of a material *fact*, as where a person discounts a forged bill, is recoverable. The banker paying the forged cheque of a customer cannot charge the customer with the loss. In England money paid under a mistake of law is ordinarily not recoverable,⁴ though there is an exception in the case where an officer of a court or a trustee in bankruptcy has received the money.⁵

It is a common condition of the sale of land that any error or misdescription shall not vitiate the sale, and may or may not be made the subject of compensation, and this condition applies whether an error complained of was discovered before or after completion of the purchase;⁶ but where the misdescription is so serious as to go to the root of the contract, the condition will not assist the vendor.⁷

Miscellaneous cases of mistake.—Mistake is an erroneous impression, amounting to conviction, that some circumstance with regard to the matter in hand is different from what it really is.

In *Bilbie v. Lumley* (1802), 2 East 469-472 : 6 R.R. 479, it was observed that money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances cannot be recovered back again on account of such payment having been made under an ignorance of the law. This case is sometimes cited as a ruling authority on the ordinary application of the maxim "ignorantia juris", etc. As to the modifications with which that maxim must be understood see (as some of the later cases) *Beauchamp v. Winn* (1873), L.R. 6 H.L. 223 ; *Daniell v. Sinclair* (1881), 6 App. Cas. 181,

1. *Wilding v. Sanderson*, [1897] 2 Ch. 534 ; Re *International Society of Auctioneers and Valuers. Baillie's Case*, [1898] 1 Ch. 110 ; *Webster v. Cecil* (1861), 30 Beav. 62.

2. *Solle v. Butcher*, [1950] 1 K.B. 671, 692 : [1949] 2 All E.R. 1107, 1119 ; *Wood v. Scarth* (1855), 2 K. & J. 33, 41 ; *Torrance v. Bolton* (1872), 8 Ch. App. 118.

3. *Hartog v. Colin and Shields*, [1939] 3 All E.R. 566.

4. *Holt v. Markham*, [1923] 1 K.B. 504.

5. Ex p. *Simmonds*, (1885), 16 Q.B.D. 308.

6. *Palmer v. Johnson*, (1884), 13 Q.B.D. 351.

7. *Flight v. Booth*, 1 Bing., N.C. 370.

190; 50 L.J.P.C. 50; 44 L.T. 257; *Bettyes v. Maynard* (1882), 46 L.T. 766; 769; 49 L.T. 389.

In *Eaglesfield v. Marquis of Londonderry* (1876), 4 Ch. D. 693 as the plaintiffs had not been deceived by any misrepresentation of fact but there had been a common misconception of law, the bill was dismissed with costs. Jessel, M.R. at page 702 observed; "A misrepresentation of law is this: When you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law". See for M.R. Jessel's illustration at pages 702 and 703, *ibid*.

In *Holt v. Markham*, [1923] 1 K.B. 504 C.A., the plaintiffs could not recover on the grounds, (1) that the plaintiffs' mistake was not a mistake of fact causing the payment, and (2) that the plaintiffs were estopped from alleging that it was paid under a mistake.

Money paid under a mutual mistake of fact can be recovered.¹ In *R. E. Jones, Ltd. v. Waring & Gillow, Ltd.*, [1926] A.C. 670 H.L.(E.), the House of Lords divided. According to Lords Shaw, Sumner and Carson, the plaintiffs were entitled to recover on the principle of *Kelly v. Solari* (1841), 9 M and W. 54. Viscount Cave and Lord Atkinson dissented. As to this case see *Hanbury*, p. 626.

In *Kelly v. Solari* (1841), 9 M. and W. 54, 58 (*per* Parke, B.): Mews' Digest, xiii, 1088: 11 L.J. Ex. 10: 6 Jur. 107: 60 R.R. 666, it was held that money paid under a *bona fide* forgetfulness of facts, which disentitled the party to receive it, may be recovered. It was observed by Baron Parke in this case at page 58 of (1841) 9 M. and W. 54: page 670 of 60 R.R. 666, that it is not sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact.

In *Bell v. Lever Brothers*, [1932] A.C. 161 H.L.(E.), according to the majority of the Lords, the action failed; as to mutual mistake, on the ground that the mutual mistake related not to the subject-matter, but to the quality of the service contracts; as to unilateral mistake, on the ground that the defendants under their contracts of service with the L. Company owed no duty to them to disclose the impugned transactions.

Money paid under a mistake of law² cannot be recovered in England.

But as it has been pointed out in *Eaglesfield v. Lord Londonderry* (1876), 4 Ch. D. 693, 702, 703 (*per* Jessel M. R.), it is difficult to draw any clear line between mistake of fact and mistake of law (see also *Ministry of Health v. Simpson*, [1951] A.C. 251 (*per* Lord Simonds at p. 270)). In *Holt v. Markham*, [1923] 1 K.B. 504, the defendant was paid by the plaintiffs gratuities on a

1. *Anglo-Scottish Beet Sugar Corporation, Ltd. v. Spalding Urban District Council*, [1937] 2 K.B. 607; *Turvey v. Dentons* (1923), *Ltd.*, [1952] 2 All E.R. 1025.

2. *Bilbie v. Lumley*, (1802) 2 East 469: 6 R.R. 479.

higher scale than he was entitled to. The excess could not be recovered as the mistake had been considered by the Court as one of law. In *In re Ainsworth Finch v. Smith*, [1915] 2 Ch. 96, the executors were held entitled to recover the overpaid amount from the tenant for life. The error of overpayment could be rectified.

In the administration of an estate, errors of account between trustees and *cestuis que trust* could be corrected. In *In re Musgrave. Machell v. Parry*, [1916] 2 Ch. 417 (Neville, J.), the trustees were entitled to deduct the income tax they had paid out of residue from future payments of the annuities on the ground that the Court will always in the administration of an estate, where possible, correct errors of account between trustees and *cestui que trust*. The rule that a man cannot recover moneys paid under a mistake of law does not apply to such a case.¹

In *In re Horne. Wilson v. Cox Sinclair*, [1905] 1 Ch. 76, the trustee who was himself one of the beneficiaries, inadvertently overpaid the other beneficiaries their shares of income, and died before any adjustment had been made. Warrington, J., held that the executors of the deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalized, by reason of the fact that their testator himself was the person responsible for the mistake that had been made.

In *Larner v. London County Council*, [1949] 2 K.B. 683 C.A., the Council was allowed to recover the amount overpaid to Larner. Speaking generally, the fact that the person overpaid had sent the money beyond recall, was no defence, unless there were some fault on the part of the paymaster and none on the part of the recipient.

In *National Association of Local Government Officers v. Bolton Corporation*, [1943] A.C. 166 H.L.(E.), it was held that an agreement by a local authority to make payments to make up war service pay to level of civilian remuneration became a contractual term of the officer's employment and was not a mere gratuity which, though promised, could be withheld at pleasure.

In *Ex parte James. In re Condon* (1874), L.R. 9 Ch. 609, the Court observed that it had jurisdiction to relieve against the mistake of law, and to order the money in the instant case to be repaid by the trustee to the execution creditor.

Section 21(1)(a) of the English Crown Proceedings Act, 1947 (10 and 11 Geo. 6, ch. 44) describes the nature of relief that can be granted in civil proceedings in the High Court by or against the Crown. In *In re Rhoades. Ex parte Rhoades*, [1899] 2 Q.B. 347 C.A., it was observed that an executor who is a creditor of his testator is not bound, in order to preserve his right of retainer out of the assets he has got in, to assert his right before occasion arises, as on an attempt to take assets out of his possession: if he asserts it then, his right will be protected, unless he has done some act, by release or

1. *Ministry of Health v. Simpson*, [1951] A.C. 251, 270 (*per* Lord Simonds).

otherwise, to deprive himself of it. This is so even though by mistake and in ignorance of his rights the executor-creditor has paid over the assets to the official receiver under the administration order. See also *Scranton's Trustee v. Pearse*, [1922] 2 Ch. 87 C.A. (trustee's right to recover) and *In re Sandiford. Italo-Canadian Corporation, Ltd. v. Sandiford*, [1935] Ch. 681 (administration of deceased solicitor's insolvent estate).

In *Wells v. Wells*, [1914] P. 157 C.A., it was held that fees owing to counsel in England are not "debts" and cannot be attached or garnished as such. In the instant case, the fees due to a barrister had been received by a firm of solicitors and not paid over. They were not debts and could not therefore be attached under a garnishee order obtained by the barrister's wife against the solicitors. The order was obtained by her for payment of alimony *pendente lite*. In *Sebel Products Ltd. v. Commissioners of Customs & Excise*, [1949] Ch. 409, it was observed *per curiam* that the defendants were placed in the same position as ordinary subjects, and there was no reason why in appropriate cases they should not refuse to refund money paid voluntarily under a mistake of law. This was a defence however which they should exercise with great discretion by reason of the position they occupied.

In *Rogers v. Ingham* (1876), 3 Ch. D. 351 C.A., it was observed that the Court will not in all cases relieve against a payment of money under mistake of law.

The Court will not generally interfere with compromise, in the absence of reprehensible circumstances.¹ In *Gordon v. Gordon* (1821), 3 Swanst. 400, Mews' Digest, v, 17; xii, 479; 19 R.R. 230, the case was one of an agreement in settlement of family disputes, one party being guilty of gross fraud and concealment of the rights of the other. The agreement was set aside after great length of time.

In *Fane v. Fane* (1875), L.R. 20 Eq. 628; Mews' Digest, v, 18, 526; ix, 1112; xvii, 1084, 1203; xx, 874, it was held that a family settlement will not be supported if founded on a mistake of either party to which the other party is accessory, although such mistake may have been innocently made.

As to delay, see *Drewry v. Barnes* (1826), 3 Russ. 94; Mews' Digest, xii, 1363; xv, 811; xvii, 42; xxi, 439; 5L.J. (O.S.) Ch. 47; 27 R.R. 20, (person suing as incumbrancer on rates).

English cases of equity and mistake and refusal of specific performance.—The written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties (*per Blackburn J.*, in *Burges v. Wickham* (1863), 3 B. and S. 669; Mews' Digest, xviii, 1783; 129 R.R. 506, 523). Even common law admits of exceptions to this rule. In equity, parol evidence is admissible in opposition to specific performance on the ground of mistake.² Moreover, though written record of a contract must not be varied or added to by verbal evidence of what was the intention

1. *Stapilton v. Stapilton* (1739), 1 Atk. 2; Mews' Digest, v, 6, 31, 32, 626; ix, 888, 910; xx, 17; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; Mews' Digest, v., 14.

2. *Townshend v. Stangroom*, (1801) 6 Ves. 328.

of the parties, such rule bars evidence only of previous or simultaneous agreements. The rule does not bar evidence of subsequent agreements which will have the effect of discharging the old contract and substituting a new one. In *Morris v. Baron & Company*, [1918] A.C. 1 H.L.(E.), it was held that a contract evidenced in writing could be impliedly rescinded by a parol contract, though unenforceable by reason of its non-compliance with the statute where there is a clear intention to rescind as distinguished from an intention to vary. See also *Hanbury*, page 627, note 29.

In *Powell v. Smith* (1872), L.R. 14 Eq: Mews' Digest, xi, 903; xv, 1044; xix, 600 (*per* Lord Romilly, M.R.), it was observed that the Court will not refuse specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.

In *Hart v. Hart*, (1881), 18 Ch. D. 670, it was held by Kay, J., that it is no answer to a suit for specific performance for defendant to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect.

In *Duke of Beaufort v. Neeld* (1845), 12 Cl. and Fin. 248 at p. 286, (*per* Lord Campbell): Mews' Digest, i, 515; iii, 1812, 1819, 1821; vi, 168; viii, 9; xvi, 48, Neeld was entitled to an injunction and the Duke of Beaufort had no equity on which to ask for the interference of the Court in his favour. It was a case of exchange of lands, ejectionment, etc.

Swaishland v. Dearsley (1861), 29 Beav. 430: Mews' Digest, xix, 594; xx, 1047, enunciates the principles on which the Court proceeds in refusing specific performance in cases of mistake.

English cases of mistake where specific performance was refused.—Equity will hold the defendant to his bargain unless injustice or real hardship would result from the order of specific performance. Fraud will not be countenanced by equity by its indiscriminate refusal to grant specific performance against improvident defendants.¹

In *Baxendale v. Seale* (1855), 19 Beav. 601: Mews' Digest, xix, 598; xx, 990, the contract was ambiguous.

In *Webster v. Cecil* (1861), 30 Beav. 62: Mews' Digest, xix, 601, A by letter, offered to sell some property to B for £1,250 by mistake, intending £2,250. B by letter, accepted the offer. The Court refused to enforce the contract.

In *Joynes v. Statham* (1746), 3 Atk. 388: Mews' Digest, xiii, 1248, a mortgagee, in an agreement for a mortgage, omitted to insert a covenant for redemption; the mortgagor could be permitted to read evidence, to show the omission.

In *Malins v. Freeman* (1837), 2 Keen 25: Mews' Digest, xix, 601; 6 L.J. Ch. 133, a party by mistake bid for the wrong lot, and was declared the purchaser. The case having been one of a clear mistake, the Court would leave the party to his remedy at law.

In *Day v. Wells* (1861), 30 Beav. 220: Mews' Digest, i, 1254; xix, 601, the Court refused to decree specific performance at the instance of the pur-

1. *Tamplin v. James*, (1880) 15 Ch.D. 215, 221 (*per*, James, L.J.).

chaser where the vendor made a *bona fide* mistake as to the authority which he had given to an auctioneer.

English cases of mistake and cancellation.—In *Calverly v. Williams* (1790), 1 Ves. Jun. 210: Mews' Digest, xx, 1169 (mistake as to part of property) it was held that small variation in general description of land is not material.

In *Scott v. Coulson*, [1903] 2 Ch. 249, a contract for the sale of a life policy was entered by both parties in the belief that the assured was alive, and the contract was completed by assignment. Between the dates of the contract and the assignment the purchaser received information which led him to believe that at the date of the contract the assured was dead, which after the date of the assignment was ascertained to have been the fact, but the purchaser never disclosed his information to the vendor. Held, that the vendor was entitled to have the transaction set aside notwithstanding that it had been completed by assignment.

In *Cooper v. Joel* (1859), 1 De G. F. and J. 240: Mews' Digest, vii, 536; ix, 1268; xvi, 395, 476, 851: 27 Beav. 313, consideration having failed, the guarantee was at an end.

In *Carpmael v. Powis* (1846), 10 Beav. 36: Mews' Digest, i, 418; vii, 817; viii, 1319: 15 L.J. Ch. 275, as there had been a mistake on both sides the deed could not be rectified, but was set aside altogether.

In *Earl Beauchamp v. Winn* (1873), L.R. 6 H.L. 223, it was held that where, in the making of an agreement between two parties, there has been a mutual mistake, as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief. The Court of equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

In *Robert Munro & Co., Ltd. v. Meyer*, [1930] 2 K.B. 312, 335, 336, it was observed by Wright J. at page 335, that where the making of a contract was not conditioned by the mistake, it could not be set aside. The *restitutio in integrum*, the possibility of which is essential to the jurisdiction of the Court of equity, does not mean that the parties would be put in the same position as if they had never made the contract.

In *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.*, [1934] 1 K.B. 143 C.A., the plaintiff's breach of the contract was not, within the meaning of the English Sale of Goods Act, 1893, Section 31, sub-section (2), a repudiation of the whole contract. The defendants' refusal of further deliveries was a breach by them of the contract; the plaintiffs were entitled to judgment on their claim in the action.

Cancellation may be granted where mistake is of law. In *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149, 170 (Lord Westbury): Mews' Digest, xiii, 730; 16 L.T. 678, the maxim of "*ignorantia juris non excusat*" did not apply. In this case the agreement having been made in mutual mistake, the plaintiff, though there was no fraud, was entitled to have it set aside.

Lord Westbury, at page 170 of (1867) 2 H.L. 149, observed that private right of ownership is a matter of fact; it may be the result also of matter of law. In the maxim "*ignorantia juris haud excusat*," the word "*jus*" has therefore the sense of general law or of private right according to circumstances.

In *Carter v. M'Laren*, 2 H.L. (Sc.) 120, 126, Lord Westbury observed that "you must ascribe to every subject a knowledge of the law, more especially in cases where it prescribes a rule of civil conduct."

In *Broughton v. Hutt* (1858), 3 De G. and J. 501: Mews' Digest, v, 29; vii, 543, the mistake was as to title. The plaintiff was entitled to have the deed of indemnity set aside as against himself.

In *Lansdowne v. Lansdowne* (1820), 2 Jac. and W. 205: Mews' Digest, v, 1024; viii, 555; ix, 365; xi, 337, 432, 835; xxi, 483, 514: 21 R.R. 43: 2 Bligh, 66, it was observed that in ambiguous contracts the domicile of the parties, the place of execution, the purpose and various provisions and expressions of the instrument are material to be considered in the construction.

In *Solle v. Butcher*, [1950] 1 K.B. 671 C.A. (Denning L.J.), on the issue of common mistake of fact, the lease was set aside. As to Denning L.J., see pages 689 *et. seq.*

In *Stone v. Godfrey* (1854), 5 De G. M. and G. 76: Mews' Digest, x, 727; xiii, 1037, 1053; xvii, 906; xx, 675; xxi, 277, it was observed that the Court has power to relieve against mistakes in law as well as mistakes in fact; but that where relief is sought against the consequences of mistake in law, the Court must be satisfied that the plaintiff's conduct has been determined by those mistakes. See also Mews' Digest, xiii, 1037-1038, for *Midland Great Western Ry. v. Johnson*, 6 H.L. Cas. 798 (mistake of law is no ground for equitable relief); *G. W. Ry. v. Cripps*, 5 Harc, 91: 4 Railw. Cas. 473 (money paid into Court); *Pullen v. Ready*, 2 Atk. 591 (construction of will); *Marshall v. Collett*, 1 Y. and Coll. 232 (party, under a misapprehension of his legal rights, parted with his property for a valuable consideration).

The Court will only exercise its power to relieve against mistakes in law as well as against mistakes in fact where there is some equitable ground which makes it inequitable that the relief should not be granted.¹

In equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as at law.² For general principles as to mistake, see Mews' Digest, xiii, 1036-1056.

English cases of mistake and rectification.—In *Leaf v. International Galleries*, [1950] 2 K.B. 86 C.A., it was observed that assuming the equitable

1. *Rogers v. Ingham*, 3 Ch.D. 351: 35 L.T. 667: 25 W.R. 338.

2. *Daniell v. Sinclair*, 50 L.J.P.C. 50: 6 App. Cas. 181: 44 L.T. 257: 29 W.R. v. 569.

remedy of rescission for an innocent misrepresentation to be open to a buyer of goods, it was not open to the buyer in the instant case as it had not been exercised within a reasonable time.

In *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.*, [1953] 2 Q.B. 450 C.A., though both the parties were under a fundamental mistake as to the nature of the subject-matter, the contract was not a nullity, for, as Denning L.J. observed, where parties to a contract were to all outward appearances in full and certain agreement, neither of them could set up his own mistake or the mistake of both of them, to make it a nullity *ab initio*.

In *Angel v. Jay*, [1911] 1 K.B. 666, it was observed that a Court of equity will not grant rescission of an executed lease on the ground of an innocent misrepresentation.

English cases of mistake and marriage agreements.—Equity is often asked to rectify marriage agreements where the articles and settlement differ. In *Legg v. Goldwire* (1736), Cast. Talbot 20: Mews' Digest, xvii, 1221, it was observed that settlement after marriage, purporting to be pursuant to articles before, but differing, would not be supported. But *secus*, if both, before marriage, except where the settlement purports to be pursuant to such articles.

In *Bold v. Hutchinson* (1855), 5 De G. M. and G. 558 (Lord Cranworth): Mews' Digest, xvii, 906, 1218, it was observed that where a settlement made before marriage purports to be in pursuance of the articles, but is not in conformity therewith, that is conclusive ground for correcting the settlement without further evidence.

In *Cogan v. Duffield* (1875), L.R. 20 Eq. 789: Mews' Digest, xvii, 1222; xx, 85: 45 L.J. Ch. 307: 2 Ch. D. 44: 34 L.T. 593 C.A., the settlement was not in accordance with the articles and, and therefore it was to be rectified.

In *Hanley v. Pearson* (1879), 13 Ch. D. 545, Bacon, V.-C., observed that the Court will order rectification of a deed on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. In *Constantinidi v. Ralli*, [1935] Ch. 427, Eve, J., observed that upon the evidence before the Court, it could not be said that the settlement was not made exactly in accordance with the plaintiff's instructions. No case for rectification had, therefore, been made out; and the Court, therefore, would not sanction the proposed compromise.

In *Banks v. Ripley*, [1940] Ch. 719, Morton, J. ordered rectification of the settlement according to the intention of the parties thereto. It was observed that the Court had jurisdiction to rectify the document on evidence afforded simply by a perusal of it, there being no other admissible evidence available. See *Bonhote v. Henderson*, [1895] 1 Ch. 742. See below.

English cases of voluntary settlements.—In *Bonhote v. Henderson*, [1895] 1 Ch. 742, it was observed by Kekewich, J., that the Court has jurisdiction, in a proper case, to reform or rectify a voluntary settlement, as well as a settlement for value.

In *Van der Linde v. Van der Linde*, [1947] Ch. 306, Evershed, J., observed that

the proposed rectification was not one which would benefit the parties, *inter se*. The Court would not, therefore, exercise its jurisdiction to rectify the deed.

In *Whiteside v. Whiteside*, [1950] Ch. 65 C.A., because of special circumstances the Court refused rectification (error of the plaintiff and new issue).

English cases that mistake must be mutual.—For rectification to be granted, there must be a mutual mistake and the agreement must have been drawn up in a manner contrary to the intention of both parties.¹

In *White & Carter (Councils), Ltd. v. McGregor*, [1962] 2 W.L.R. 17, 37 H.L. (Sc.), it was observed by Lord Hudson that equity will not rewrite an improvident contract where there is no disability on either side.

The collateral agreement on which a claim for rectification is based, must be clearly proved.²

In *Erskine v. Adeane* (1873), 8 Ch. 756, there was a binding collateral agreement to kill down the game, and the tenant was entitled to compensation for damage done by the game.

In *Hodges v. Jones*, [1935] Ch. 657, Luxmoore, J., observed that the plaintiffs had not succeeded in establishing the collateral agreement they alleged. See *Druiff v. Parker* (1868), L.R. Eq. 131; Mews' Digest, iii, 252, 290; 37 L.J., Ch. 211, as to the rectification of the form of instrument. In the instant case the instrument was a bill of exchange.

See *Wake v. Harrop* (1862), 1 H. and C. 202; Mews' Digest, viii, 1094; xiii, 1055; xvi, 269; xviii, 245—Ex. Ch. as to the equitable plea that the defendant signed the charterparty as agent for a third party and not in fact as principal.

In *Bull v. Storie* (1823), 1 Sim. and S. 210; Mews' Digest, xi, 478; 24 R.R. 140 (prayer for an injunction restraining proceeding), Leach, V.H.C., held that a Court of equity will reform an instrument which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument.

Great weight must always be attached to an assertion by the defendant that the instrument as it stands expresses its true intentions. Without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it cannot be reformed. See *per* Lord Eldon in *Lovenshead (Marquis) v. Stangroom* (1801), 6 Ves. 328; Mews' Digest, i, 434; xiii, 1046; xix, 540, 600; *per* Lord Chelmsford in *Fowler v. Fowler* (1859), 4 De G. and J. 250; Mews' Digest, v, 28; xiii, 1045, and *Mortimer v. Shortall*, 2 Dr. & War. 363; 1 Con & L. 417.

1. *Murray v. Parker*, (1854) 19 Beav. 305; Mews' Digest, vii, 556; xi, 1086, 1087; xiv, 592 (Romilly, M.R.).

2. *Hodges v. Jones*, [1935] Ch. 657, 667 (Luxmoore, J.); *Erskine v. Adeane*, (1873) L.R. 8 Ch. 756, 766 (Sir G. Mellish, L.J.).

In *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368: Mews' Digest, xviii, 1575, the prayer was for the rectification of a policy of a marine insurance to make it conformable to the real contract.

In *Shipley U. D. C. v. Bradford Corporation*, [1936] Ch. 375, Clauson J., observed that the agreement bore the construction which the Council claimed to have placed upon it. If that construction were wrong the Court would, notwithstanding the absence of any antecedent binding contract, rectify the instrument of agreement, so as to give effect to what was proved to have been the concurrent intention of the parties at the moment of executing the same.

In *Mortimer v. Shortall* (1842), 2 Dr. & War. 363: Mews' Digest, i, 119; vii, 553; xi, 1086, 1163; xiii, 1046: 1 Con & L. 417, it was observed that there is no objection to correct a deed by parol evidence when there is anything in writing beyond the parol evidence to go by. (See also *Murray v. Parker*, 19 Beav. 305).

In *A. Roberts & Co. Ltd. v. Leicestershire County Council*, [1961] Ch. 555, it was observed by Pennycuik, J., that a party was entitled to rectification of a contract if he proved beyond reasonable doubt that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed that term to be included.

In *White v. White* (1872), L.R. 15 Eq. 247, a deed was executed purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole. The deed was rectified in order to pass the entirety.

In *Bell v. Cundall* (1750), Ambl. 102 (Lord Hardwicke): Mews' Digest, ix, 876, it was observed that a Court of equity will not rectify a mistake of names in a recovery, especially after a length of time and against a purchaser.

English cases of choice between remedies in cases of unilateral mistake.—For rectification to be granted, the mistake must be mutual.¹

In *Harris v. Pepperell* (1867), L.R. 5 Eq. 1: Mews', Digest, xiii, 1043, 1047, and *Paget v. Marshall* (1884), 28 Ch. D. 255, the cases were of unilateral mistake. See however *May v. Platt*, [1900] 1 Ch. 616, *per* Farwell, J., as to the criticism that the said decisions were incorrect as decisions on mistake, though they would have been correct as decisions on fraud. See also Hanbury, page 637.

In *Woollam v. Hearn* (1802), 7 Ves. 211: Mews' Digest, xix, 539 it was observed that though a defendant, resisting specific performance, may go into evidence to show that by fraud the true terms were not expressed in the written agreement, yet plaintiff cannot do so for the purpose of obtaining specific performance, with a variation of the contract. See also *Forgione v. Lewis*, 89 L.J. Ch. 510.

1. *Murray v. Parker*, (1854) 19 Beav. 305 (*per* Rommilly, M.R.): Mews' Digest, vii, 556; xi, 1086, 1087; xiv, 592.

In *Olley v. Fisher* (1886), 34 Ch. D. 367 : Mews' Digest, vii, 553 xix, (*per* North, J.), it was however held that the Court had jurisdiction, in one and the same action, to rectify a written agreement, and to order specific performance of the agreement thus rectified. In *Craddock v. Hunt* [1923] 2 Ch. 136, it was held that specific performance could be obtained of a written contract with a parol variation (Lord Sterndale and Warrington L.J.).

In *United States of America v. Motor Trucks, Ltd.*, [1924] A.C. 196 P.C. (on appeal from the Supreme Court of Ontario, appellate division), it was observed that where owing to a mistake common to both parties to a contract in writing it does not express the true bargain between the parties, the Court has jurisdiction to rectify the contract and to order specific performance of it as rectified.

Where the defendant alleged that the real agreement differed from the ostensible agreement and resisted specific performance, the Court when satisfied as to the discrepancy, could offer to the plaintiff the choice having the agreement performed in the way contended for by the defendant or rescinded.¹

The effect of rectification is to relegate the old instrument to oblivion ; the new is not substituted for the old, but the old is regarded as never having existed.² Younger, L.J., observed that assuming the existence of common mistake, the plaintiffs could not have rectification involving specific performance of a written agreement with a parol variation.

A defendant may adduce parol evidence of mistake in a written contract for the purpose of resisting specific performance.

An omission in an agreement by mistake stands on the same ground as an omission by fraud.³ Parol evidence is admissible for resisting specific performance of contract for land on mistake and surprise, as well as fraud, but not to vary, add to, or explain the written contract.⁴

English cases of personality of promisee and equity.—The personality of the promisee has rarely been relevant in equity cases. See *Hanbury*, page 639. In *Fellowes v. Gwydyr* (Lord) 1829), 1 Russ. & My. 83 : Mews' Digest, ix, 1059 ; xix, 607, it was held that if A., in contracting with B., falsely represents himself to be the agent of C., and thereby obtains better terms, the Court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation.

In *Dyster v. Randall & Sons*, [1926] Ch. 932, Lawrence, J., observed that unless the possession by one of the contracting parties of some personal quality is a material ingredient of the contract, the mere non-disclosure of the person actually entitled to the benefit of the contract for the sale of land is no defence to an action for specific performance, even though the plaintiff

1. *Ramsbottom v. Gosden* (1812), 1 V. & B. 168 : Mews' Digest, xiii, 1043 ; xix, 540 ; xx, 1112, 1497 : 12 R. R. 207 ; *Smith v. Wheatcroft* (1878), 9 Ch.D. 223.

2. *Craddock Bros. v. Hunt*, [1923] 2 Ch. 136 C.A.

3. *Ramsbottom v. Gosden* (1812), 1 V. & B. 168 : 12 R. R. 207.

4. *Clowes v. Higginson*, 1 V. & B. 524 : 12 R. R. 284 : Mews' Digest, xix, 539.

knows that, if the disclosure had been made, the defendant would not have entered into it. For mistaken identity of personality, *See also* page 411, *ante*.

English cases of difficulties of rectification.—In *Clowes v. Higginson* (1813), 1 V. & B. 524: Mews' Digest, xix, 323, 539; xx, 990, the written terms of the contract left it doubtful whether timber was included or excluded. The Court could not adopt the purchaser's own construction, and therefore did not compel the vendor to convey upon the terms originally offered. Specific performance is discretionary in the Court. In *Berners v. Fleming*, [1925] Ch. 264 it was held that a defendant was not entitled to treat the plaintiff's original insistence on a wrong construction as a repudiation by him of the entire contract, and to counterclaim for rescission and the return of his deposit where the said defendant in his defence had pleaded that he was willing to complete on the right construction. In *Preston v. Luck* (1884), 27 Ch. D. 497, the plaintiff was allowed to amend his claim and was granted an injunction restraining the defendant from parting with the right. In *Jervis v. Berridge* (1873), L.R. 8 Ch. 351: Mews' Digest, v, 732; xii, 742; xv, 1070; xix, 530: 42 L.J., Ch. 518, it was observed that when a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, to attempt to retain possession and refuse to perform the verbal terms amounts to fraud.

In *Howatson v. Webb*, [1908] 1 Ch. 1 C.A., the misrepresentation being only as to the contents of a deed known by the defendant to deal with the property, his plea failed and he was liable on the covenant. *See also* [1907] 1 Ch. 537 (*Warrington, J.*).

23. The consideration or object of an agreement is lawful, unless—

What considerations and objects are lawful and what not. it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 1,000 rupees at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each

an agreement is lawful in itself it will be unlawful if it cannot be achieved without violation of law or without doing something immoral or opposed to public policy. A contract to do a thing which cannot be performed without violation of law is void, whether the parties knew the law or not. Likewise the object of the contract may be lawful in itself but its fulfilment may offend against the well-settled notions of public policy.¹

Section 23 is not concerned with motive. It is confined to the object of the transaction and not to the reasons or motives which prompted it. *B*, a Hindu, borrowed a certain amount from *A* in order to bribe a certain officer. After the bribing was done and completed, *B* obtained a loan from *C* in order to pay off *A* and executed a mortgage in favour of *C*. It was held that the purpose of the mortgage loan was not to effect an illegal purpose. Such illegal purpose as had been effected had been effected. The mortgage loan was at worst a loan designed to enable the borrower to pay back a lender who could not have sued the borrower in a court of law successfully and therefore it was no more contrary to public policy than would be a loan to a borrower to enable the borrower to make a gift. The mortgage consequently was not void on account of public policy. The fact that the mortgagee as security of title took a number of documents from the mortgagor for the ordinary loan and regarded the transaction as queer did not make the transaction contrary to public policy.²

If the object of transfer of property is immoral, the transfer is void, and there cannot be any conveyance of any interest effected by the transfer. If the transfer is invalid, the person passing the document retains the title in himself and would ordinarily be entitled to recover the property on the ground that the title has not passed from him. But the principle of equity enunciated in the case of *Ayerst v. Jenkins* (1873), 16 Eq. 275, would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy.³ An assignment for illegal future cohabitation is void.⁴ An unlawful agreement of partnership will be refused registration by Income-tax authorities.⁵

Criteria of unlawfulness.—The several criteria of unlawfulness of a consideration or object of an agreement as given in Section 23 are overlapping one another. Moreover, there are other Sections in the Contract Act rendering particular classes of agreements void. The provisions of Section 23 as to the indicia of unlawfulness of the consideration or object of an agreement are indeterminate in their wordings and as such do show good drafts-

1. *Gulabchand v. Kudilal*, (F.B.), A.I.R. 1959 M.P. 151.

2. *Kasinath v. Bapurao*, (F.B.), A.I.R. 1940 Nagpur 305.

3. *Sabava Yellappa v. Yamanappa*, A.I.R. 1933 Bom. 209; *Deivana Yaga v. Muthu Reddi*, 44 Mad. 329; A.I.R. 1921 Mad. 326; 59 I.C. 1003; *Immani Appa v. Ramalingamurthi*, A.I.R. 1962 S.C. 371.

4. *Thasi Muthukannu v. Shunmugavelu*, (1905) 28 Mad. 413; *Kandaswami v. Narayanaswami*, (1923) 45 M.L.J. 551; 76 I.C. 306; *Mt. Roshun v. Muhammad*, (1887) Punj Rec. 46; *Ghuma v. Ram Chandra Rao*, A.I.R. 1925 All. 437; 88 I.C. 411.

5. *Mahapatra Bhandar v. Commr. of I. T.*, A.I.R. 1965 Orissa 160.

manship. In a given scope, the law should be in general provisions in order to enable the Court to mould the principles to meet new situations in society. Any attempt at precision or economy of words would likely to be at the cost of cognoscibility of the intention of the Legislature.¹

A agrees to sell his house to *B* for Rs. 10,000. Here *B*'s promise to pay the sum of Rs. 10,000 is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the amount of Rs. 10,000. These are lawful considerations. *A* promises to pay *B* Rs. 1,000 at the end of six months, if *C*, who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations. *A* promises for a certain sum paid to him by *B* to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations. *A* promises to maintain *B*'s child and *B* promises to pay *A* Rs. 1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

When the unlawfulness of a consideration is brought to the notice of the Court, the Court will give effect to the fact even though it may not have been pleaded by the defendant.²

Unlawfulness and pleadings.—Even where the contention regarding the illegality of the contract is not raised by the defendant, the Court will not grant relief if the illegality appears from the evidence adduced in the case or is otherwise brought to the notice of the Court.³ When it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take an objection, and that too whether the parties take or waive the objection. Even if there be no pleading by the defendant the Court is entitled to consider the question of legality of a contract, and if it is found that the contract is illegal, the Court must not enforce any obligation arising out of that illegal contract.⁴ The objection that a contract is illegal, when taken, must be considered even though taken late. It is open to the appellate court even without a pleading to consider the question whether the agreement relied on or proved in the case is immoral,⁵ illegal, or opposed to public policy. There is no question of estoppel for the parties. The knowledge of the illegality may come from the statement of the party who was himself guilty of the illegality or it may even come from outside sources. It is for the protection of the public that the Court refuses to enforce such a con-

1. See *Manikka Mooppanar v. Peria Muniyandi*, A.I.R. 1936 Mad. 541; 70 M.L.J. 724; 164 I.C. 31.

2. *Alice Mary Hill v. William Clarke*, (1905) 27 All. 266.

3. *United Industries v. Moideen*, A.I.R. 1956 T.C. 101; *Immani Appa v. Ramalingamurthi*, A.I.R. 1962 S.C. 371.

4. *Sewsagar v. Satyanarain*, A.I.R. 1960 Patna 145; *Dominion of India v. Bhikraj*, A.I.R. 1957 Patna 586.

5. *Kotharaju v. Tekumalla*, A.I.R. 1959 Andhra 370.

tract.¹ The observation, therefore, made in *Subbayan v. Ponnuchami*, A.I.R. 1941 Mad. 727, to the effect that the plea as to the invalidity of a deed on the ground of its being against public policy being a mixed question of law and fact cannot be raised for the first time in a second appeal does not appear tenable.

A person who asks an agreement or a conveyance to be declared invalid on account of its being opposed to public policy must prove the grounds which would bring it under Section 23.² Oral evidence is admissible, under proviso (1) to Section 92 of the Evidence Act, to prove that the consideration or object of an agreement was unlawful though the agreement in question was reduced to writing.

Void and voidable.—There is this difference between these two words : *void* means that an instrument or transaction is so nugatory and ineffectual that nothing can cure it ; *voidable*, when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it. Thus, while acceptance of rent will make good a voidable lease, it will not affirm a void lease.

‘Null and void’ when used in a statute or legal document indicates the exact contrary of the words “full force and effect.”³

Voidable means that a thing is valid until repudiated, not that it is invalid until confirmed.⁴

When a deed or other transaction is “void” on default of doing or suffering something by one of the parties thereto, this means voidable at the election of the party not in default.⁵ In a long series of decisions the Courts have construed clauses of forfeiture in leases, declaring in terms however clear and strong that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract.

If it be doubtful whether a statute declaring an act, instrument, or contract void, makes it voidable only, another clause in the same statute imposing a penalty on such act, instrument, or contract, is a clear test that it is *ipso facto* void. The penalty makes it illegal. A penalty implies a prohibition though there are no prohibitory words in the statute. Otherwise, the expression “void to all intents and purposes,” or “utterly void and of none effect, to all intents, constructions and purposes” has been held to mean in given

1. *Abdula Saheb v. Guruvappa & Co.*, A.I.R. 1944 Mad. 387; *In re Mahmoud*, [1921] 2 K.B. 716; *Harry Parker, Ltd., v. Mason*, [1940] 2 K.B. 590; *Holman v. Johnson* (1775), 1 Cowp. 343; *Snell v. Unity Finance, Ltd.* [1963] 3 All E.R. 50 C.A.; *Ramkripal v. Bilaspur Municipal Committee* A.I.R. 1963 M.P. 240; *Sitaram v. Kunj Lal*, A.I.R. 1963 All. 206.

2. *Subbayan v. Ponnuchami*, A.I.R. 1941 Mad. 727.

3. Wharton : *Law Lexicon*, 14th ed., 1953, 1049.

4. *Duncan v. Dixon*, 44 Ch. D. 211; Stroud : *Judicial Dictionary*, 3rd ed. 1953, vol. 4, 3232.

5. *Hughes v. Palmer*, 29 C.B.N.S. 393; *Molton v. Camroux*, 2 Ex. 487; 4 Ex. 17.

circumstances as only voidable. The words additional to the expression "void" have been construed only as expletive. For illustrations, see *Stroud*, 'void'.¹

The difference between an instrument which is voidable and one which is void from the beginning is this : In the former the right under the contract continues until it is avoided, and therefore restoration of property handed over in pursuance of it cannot be claimed until the instrument is avoided either by the act of parties or through the Court. In the latter, no legal contract ever came into being and so the rights of the parties determined independently of the deed. There is no need to avoid or cancel that which never existed in the eye of the law.²

As to the definition of void and voidable agreements see Section 2(g) and (j), and Section 2(i) respectively, *ante*.

Valid but unenforceable contracts.—Some contracts are subject to special procedural requirements. Under Section 40(1) of the English Law of Property Act, 1925, no action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised. Section 40 of the said Act applies to contracts whether made before or after the commencement of the said Act and does not affect the law relating to part performance, or sales by the Court. Failure to satisfy these requirements of Section 40(1) of the English Law of Property Act, 1925, thus affects only the enforceability of the contract and not its validity. Consequently, such a contract though not enforceable because of the non-compliance with the statutory requirements, is not without any legal incident. The contract being valid, a deposit of money made by the purchaser to the vendor under an oral contract for the sale of land cannot be recovered by legal action by the purchaser inasmuch as the said deposit was made under a valid contract though such a contract was unenforceable under the English Statute of Frauds, 1677, or the English Law of Property Act, 1925.³ The contract being a valid one, the defendant, that is, the vendor could avail himself of it by way of defence. In England, in the Chancery Division of the Supreme Court, the purchaser though not entitled to recover damages for a breach of the contract for the sale of land as orally made can obtain a decree of specific performance on the basis of the doctrine of part performance.⁴ The doctrine of part performance while not enforcing the contract at all seeks to charge the defendant upon the equities resulting from the acts done in execution of the contract, and not

1. *Stroud : Judicial Dictionary*, 3rd ed., 1953, vol. 4, 3227.

2. *Asaram v. Ludheshwar* (F.B.), A.I.R. 1938 Nag. 335; *Petherpermal v. Muniandy* (P.C.), 35 Cal. 551; 35 I.A. 98; 12 C.W.N. 562; 7 C.L.J. 528; *Husen v. Rajaram*, 10 N.L.R. 133; A.I.R. 1914 Nag. 75; 26 I.C. 813; *Shamsher v. State of U. P.*, A.I.R. 1964 All. 395.

3. *Thomas v. Brown* (1876), 1 Q.B.D. 714, 723.

4. *Britain v. Rossiter* (1879), 11 Q.B.D. 123, 130.

upon the contract itself. Equities are applied in order to avoid injustice of a kind which a statute or the Legislature cannot be thought to have had in its contemplation.¹ On such and other reasons the Court has granted relief to the plaintiff.² Where the plaintiff has been permitted by the defendant to do acts, clearly referable³ to the contract, which have so altered his position that it would be a fraud in the defendant to take advantage of the absence of a written agreement, note or memorandum, he will be entitled to judgment even though the defendant pleads Section 40(1) of the English Law of Property Act, 1925.⁴

Void and illegal contracts.—There are transactions which the law of the country does not countenance. The agreements which seek to embody the undertaking of such transactions are known as illegal contracts. The prohibition as to such transactions may be a statutory one. It may also be based on the common law, that is, uncodified principles of law of the country. The said uncodified principles may be derivable from judicial decisions or personal law of the citizens. They may also be based, ultimately, on the sense of morality of the society. Illegal contracts thus involve either in their making, performance, consideration, or purpose a violation of law or of sexual morality. The illegal contracts because of their turpitude do not enjoy the sanction of the law of the country for their enforcement.⁵

Void contracts are not tinged with any turpitude; they are only not enforceable, because in the eye of the law no contract has been formed at all in the given circumstances.

The distinction between illegal and void contracts is often lost sight of, and the two terms are used as interchangeable. Thus Wharton: *Law Lexicon* says:

“An illegal contract is an agreement to do any act forbidden either (1) by the common law, such as agreements to commit a crime or tort, or as for rent of lodgings let for prostitution, or for price of indecent picture, or in prejudice to the administration of justice, or (2) by statute, as by hire of a room for a lecture in contravention of the Blasphemy Act⁶ or a contract by a servant of a local authority with such authority, in contravention of Section 193 of the Public Health Act, 1875; also contracts in unreasonable restraint of trade; general restraint of marriage; trading with the enemy; compounding felonies, maintenance or champerty, etc. A breach of promise by a married man pending divorce after decree *nisi* may be actionable.⁷ Illegality supervening by act or change in the law terminates the contract.

1. *Maddison v. Alderson* (1883), 8 App. Cas. 467, 475; *Britain v. Rossiter* (1879), 11 Q.B.D. 123, 130.

2. *Maddison v. Alderson* (1883), 8 App. Cas. 467, 489; *Rawlinson v. Ames*, [1925] Ch. 96, 109-13.

3. *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Rawlinson v. Ames*, [1925] Ch. 96.

4. *Broughton v. Snook*, [1938] 1 Ch. 505, 513; [1938] 1 All E.R. 411, 418.

5. *Ramkripal v. Municipal Committee, Bilaspur*, A.I.R. 1963 M.P. 240.

6. But see *In re Bowman*, [1915] 2 Ch. 447.

7. *Fender v. St. John-Mildmay*, (1937) 53 T.L.R. 885; [1938] A.C.1.

An illegal contract cannot be sued on."¹ A contract illegal according to *lex fori* is unenforceable.²

As noted before, in modern writings void is distinguished from illegal.

Where a statute merely imposes a penalty without declaring a contract to be illegal or void, the imposition of penalty by itself does not have the effect of making the contract made in contravention of a specific provision or the statute illegal or void. It must further be seen whether the statute was designed as a whole to further a public policy.

Section 23 of the Contract Act does not hit a partnership made in contravention of Section 6 of the Central Excises and Salt Act, 1944, and Rules 175(2), 178(4) and 210 framed under the Act inasmuch as the Act was not designed as a whole to further a public policy, and consequently the settlement of account of the partnership and a promissory note executed for the payment of the amount is not void.³

In *Varadarajulu v. Thavasi Nadar*, A.I.R. 1963 Mad. 413, it was held that a partnership firm could not use the vehicle with a permit obtained in the name of one partner alone, unless the permit was transferred in the name of the partnership with the permission of the transport authority under Section 59(1) of the Motor Vehicles Act. Therefore, any claim arising out of the settlement of accounts of the partnership was also illegal and could not be enforced. See also the cases referred to by their Lordships. Section 41 of the Specific Relief Act, 1877, was found not applicable to the facts of the case.

When a partnership is alleged by the plaintiff to be illegal under Section 23 of the Contract Act, he has to establish the illegality by such evidence as he can place before the Court.⁴ Where the C.P. & Berar Money-lenders Act, 1934, imposed penalty on a contract, the contract was not necessarily prohibited.⁵ If a contract is illegal, awards given by arbitrators on the basis thereof are unenforceable.⁶ A monopoly contract is hit by Article 19(1)(g) of the Constitution.⁷ Contracts made in non-compliance with Article 299(1) of the Constitution are void.⁸ See also under Section 11, *supra*.

Where money-lending without a necessary licence is penal, suits by persons without the licence at the time of the suit transaction will be dismissed on grounds of public policy.⁹ The Full Bench decision holding the contrary view in *Shamshir Ali v. Ratanji*, (1952) Hyd. 95 : A.I.R. 1952 Hyd. 58, has been overruled in the later Full Bench decision in *Mohd. Salem v. Umaji*, as

1. *Ibid.* 492.

2. *Societa Anonmina v. Gorakhram*, A.I.R. 1964 Mad. 532.

3. *Bhushayya v. Chinnapareddi*, A.I.R. 1960 Andhra 39.

4. *Subba Raja v. Narayana Raja*, A.I.R. 1954 Mad. 1074 *Vazhmuni v. Nathamuni*, A.I.R. 1930 Mad. 361; 122 I.C. 342.

5. *Janki Bai v. Ratan Melu*, (F.B.) A.I.R. 1962 M.P. 117.

6. *Societa Anonmina v. Gorakhram*, A.I.R. 1964 Mad. 532.

7. *Hamara Radio Co. v. State of Rajasthan*, A.I.R. 1964 Raj. 205.

8. *Bhukhraj v. State of Bihar*, A.I.R. 1964 Patna 555.

9. *Mohd Salem v. Umaji* (F.B.), A.I.R. 1955 Hyd. 113.

reported in A.I.R. 1955 Hyd. 113. The reasoning of the earlier Full Bench decision¹ was no doubt very convincing. Their Lordships observed :

"If a statute does not declare a contract made in violation of it to be void and if it is not necessary to hold the contract void in order to accomplish the purpose of the statute the inference will be that it was intended to be directory and not prohibitory of the contract. Applying this dictum to the Hyderabad Moneylenders Act (Act V of 1949F) and assuming that the purpose of the said Act was to compel moneylenders to maintain regular accounts and allow opportunity to the supervising authorities to check their accounts, the Full Bench of the Hyderabad High Court held it unnecessary to hold a contract entered into without a licence as void in order to accomplish the said purpose of the Act. The money lent was therefore recoverable from the debtor because it was not intended by the Act that moneylending transactions should be prohibited without a licence. The said Act thus neither rendered the transaction illegal nor incapacitated the moneylender from doing business."

For the purpose of judicial precedents, however, the latter Full Bench decision will prevail.

There is a clear distinction between a transfer being void and a transfer being forbidden by law.²

The word "lawful" used in Order 23, Rule 3, of the Code of Civil Procedure means lawful within the meaning of the Contract Act. If therefore the object or consideration of the compromise on which the decree is based comes within any of the matters enumerated in Section 23 of the Contract Act as making an agreement unlawful the compromise decree itself is unlawful and is thus void.³ A compromise decree vitiated under the provisions of the Contract Act is thus not binding on the parties as *res judicata*. A compromise decree, for example, in a previous suit agreeing to divide the amount of pension in certain proportion between the parties will not operate as *res judicata* between the same parties in a subsequent suit to recover the plaintiff's share wrongfully withdrawn by the defendant. Such decree can be ignored as being void *ab initio* in view of Section 12 of the Pensions Act read with Section 23 of the Contract Act.⁴

When a contract is void, the arbitration clause contained therein is also void. The parties who have submitted to arbitration in such a clause in a void agreement are not bound by estoppel.⁵

1. *Shamshir Ali v. Ratnaji* (F.R.), A.I.R. 1952 Hyderabad 58.

2. *Jokhan Misra v. Mahesh Pandit*, A.I.R. 1949 All. 637; *Dip Narain v. Nageshwar*, (F.B.) 52 All. 338; A.I.R. 1930 All. 1; *Raghunath v. Laxman*, 154 I.C. 49; A.I.R. 1934 All. 246.

3. *Baldeo Jha v. Ganga Prasad*, A.I.R. 1959 Patna 17; *Savitri v. Savi*, 12 Pat. 359; A.I.R. 1933 Patna 306; *Western Electric Co., v. Kailash Chand*, (1940) Bom. 13; A.I.R. 1940 Bom. 60.

4. *Baldeo Jha v. Ganga Prasad*, A.I.R. 1959 Patna 17.

5. *Raymon and Co. v. Khardah Co.*, A.I.R. 1960 Cal. 86; *Union of India v. Rallia Ram*, A.I.R. 1963 S.C. 1685.

Supposing that the arbitrator finds that the arbitration agreement is valid, such a finding cannot bind the parties if later on it is found by the Court that the arbitration agreement is invalid.¹

Contracts illegal at English common law.—A plaintiff cannot enforce a contract which to his knowledge will result in the commission of a crime or immorality or other conduct of a reprehensible character. If such illegality is brought to the notice of the Court, the plaintiff, provided that he is implicated in it, will receive no assistance from the Court. It is immaterial whether or not the defendant has pleaded the illegality.²

In England it is a presumption that every contract in restraint of trade is contrary to public policy and is therefore void. The presumption is rebuttable only by proof that the restraint is reasonable in the interests of both the contracting parties and also in the interests of the public. The burden is on the covenantee to prove that the restraint goes no further than is reasonably required for the protection of his business. The burden is on the covenantor to prove that the contract tends to injure the public.³ A restraint imposed upon the vendor of a business, that he will not compete against the purchaser, may be valid; but a similar restraint imposed upon a servant cannot be valid unless it is reasonably necessary to protect the master's trade connection or trade secrets. A restraint which is too wide may be severed by the Court.⁴ See further, under Section 27, *post*. As to the Indian law also, see under Section 27, *post*.

An agreement, though not on its face illegal, is nevertheless illegal if the intention is that its subject-matter shall be used for an illegal purpose of a reprehensible character, such as defrauding the revenue. This principle is equally applicable where the intention is that the document or documents expressing the contract shall be used for such illegal purpose.⁵

Money paid under a contract which is illegal in that it involves conduct of a criminal, immoral, or otherwise reprehensible character is irrecoverable if the plaintiff cannot substantiate his claim without disclosing such illegality.⁶

A contract which has an incontestable tendency to harm the public good is illegal and void as being contrary to public policy. The doctrine of public policy already established by precedents will be moulded to suit new conditions, but new heads of public policy will not now be created.⁷ See also below.

A contract which, as made or as performed, is expressly or impliedly forbidden by statute will not be enforced whether there is an intention to

1. *Suwalal v. Clive Mills Co.*, A.I.R. 1960 Cal. 90; *Bhudarmull v. Uma Shankar*, A.I.R. 1953 Cal. 618 overruled.

2. *Pearce v. Brooks* (1866), L.R. 1 Ex. 213.

3. *A.-G. of Australia v. Adelaide Steam Ship Co.*, [1913] A.C. 781, 796.

4. *Attwood v. Lamont*, [1920] 3 K.B. 571.

5. *Alexander v. Rayson*, [1936] 1 K.B. 169.

6. *Berg v. Sadler and Moore*, [1937] 2 K.B. 158.

7. *Fender v. St. John-Mildmay*, [1938] A.C. 1.

break the law or not. The question whether a contract is impliedly forbidden depends upon the construction of the statute, and for this purpose no test is decisive. A contract which, as made or as performed, is not forbidden by statute does not become illegal merely because some collateral act of illegality is committed during the course of performance. A right directly accruing from a crime may not be enforced by the criminal or his representative.¹

An agreement which is collusive in its nature and which has been entered into by the parties in order to persuade each other to be parties to divorce proceedings, or to affect the due administration of the law on matrimonial causes or to oust the jurisdiction of the Court is illegal.²

An agreement tending to promote corruption in public life is illegal. Public offices, for example, that is, the offices that are paid from national funds cannot be procured, bought, or sold on pecuniary considerations.³ Neither can honours be the subject-matter of an agreement.⁴ Both the English common law and statutory law make such agreement illegal. The English Honours (Prevention of Abuses) Act, 1925 (15 and 16 Geo. 5, c. 72), Section 1, provides for the punishment of abuses in connection with the grant of honours. If any person accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, or for any purpose, any gift, money, or valuable consideration as an inducement or reward for procuring or assisting or endeavouring to procure the grant of a dignity or title of honour to any person, or otherwise in connection with such a grant, he will be guilty of a misdemeanour. Similarly, if any person gives, or agrees or proposes to give, or offers to any person any gift, money, or valuable consideration as an inducement or reward for procuring or assisting or endeavouring to procure the grant of a dignity or title of honour to any person, or otherwise in connection with such a grant, he will be guilty of a misdemeanour. When the person convicted received any gift, money, or consideration which is capable of forfeiture, he will be, in addition to any other punishment, liable to forfeit the same to Her Majesty. The salary of a public office cannot be assigned.⁵ Where an agreement has been made in such a way as to enable a party to defraud national or local revenue, it will be illegal.⁶ See *Surasaibalini v. Phanindra*, A.I.R. 1965 S.C. 1364.

1. *St. John Shipping Corporation v. Joseph Rank, Ltd.*, [1957] 1 Q.B. 267; see Cheshire and Fitford: *Cases on the Law of Contract*, 3rd edn. 1959, 234.

2. *Emanuel v. Emanuel*, [1946] P. 115; [1945] 2 All E.R. 494.

3. *Balchford v. Preston* (1799), 8 Term. Rep. 89; *Garforth v. Fearon* (1787), 1 Hy. Bl. 328; *Re Mirams*, [1891] 1 Q.B. 594.

4. *Parkinson v. College of Ambulance, Ltd. and Harrison*, [1925] 2 K.B. 1.

5. *Liverpool Corporation v. Wright* (1859) John. 359; *Flarty v. Odium* (1790), 3 Term. Rep. 681; *Barwick v. Reade* (1791), 1 Hy. Bl. 627; *Arbuthnot v. Norton* (1846), 5 Moo. P.C.C. 219; *Palmer v. Bate* (1821), 2 Brod. & Bing. 673; *Cooper v. Reilly* (1829), 2 Sim. 560.

6. *Müller v. Karlinski* (1945), 26 T.L.R. 85; *Napier v. National Business Agency, Ltd.*, [1951] 2 All E.R. 264; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Edler v. Auerbach*, [1950] 1 K.B. 359; [1949] 2 All E.R. 692.

It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.¹

Collateral contracts.—‘Collateral’ is that which cometh in or adhereth to the side of anything; as a collateral assurance, is that which is made over and beside the deed itself.” The word “collateral”, e.g., collateral security, means, side by side, “parallel”, and, taken by itself, has no such meaning as “secondary”, “auxiliary”, “subsidiary”, or “only to be made use of in aid.”² For some of the modern views as to the signification of the expression ‘collateral’, see under *Collateral security*, *post*. See also *Collateral transactions*, under Section 30, *post*.

‘Collateral’ means indirect, sideways, that which hangs by the side. A collateral assurance is that which is made over and above the deed itself. A collateral security is a deed made of other property, besides that already mortgaged, for the better safety of the mortgagee, or a bill of exchange given, or a pledge deposited to secure a pre-existing debt. A collateral contract is where a contract by word of mouth co-exists with a contract in writing made at the same time, notwithstanding the general rule that an oral merges in a written contract.³

Collateral contracts must from their very nature be rare. A collateral agreement must be in every sense a complete legal contract, and the effect must be to vary or add to the terms of the contract. Such collateral contracts are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have effect of lessening the authority of written contracts by making it possible to vary by suggesting the existence of verbal collateral agreement relating to the same subject-matter.⁴

Not only a contract which is fundamentally illegal is void but also a contract collateral to it is void. Thus where a covenant is given for the payment of the purchase money, and the purchase money in question was one for an illegal sale, it cannot be enforced. The covenant to pay the money sprang from, and was the creature of, the illegal agreement, and as the law would not enforce the original illegal contract of sale, so neither will it allow

1. *Antonio Buttigieg v. Stephen*, A.I.R. 1947 P.C. 29; *Roderikstiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500.

2. Stroud: *Judicial Dictionary*, 3rd ed., 1952, vol. 1, 515; *Early v. Early*, 16 Ch.D. 214; *Athill v. Athill*, 16 Ch.D. 211; *Leonino v. Leonino*, 10 Ch.D. 460.

3. Wharton: *Law Lexicon*, 14th ed., 1953, 211.

4. *Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd.*, A.I.R. 1945 P Heilbut *Symons & Co. v. Buckleton*, [1913] A.C. 30 *relied on*.

the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.¹

For a contract to be collateral to an illegal contract, the parties need not be the same. Even where one of the parties to the collateral contract is a stranger to the original illegal contract, but was aware of the illegality thereof while entering into the collateral contract, he will be treated on the same footing as the original parties themselves and thus will not be allowed to enforce the contract. Thus where a stranger volunteers to be a party to the collateral contract with a full knowledge of the illegal object of the original contract to the achievement of which the collateral contract was rendered necessary, he cannot enforce his claims under such contract. The law makes no difference between a party to the original contract as a party to the collateral contract and a stranger to it where the latter became a party to the collateral contract with the knowledge of the illegality of the original transaction.²

The lending of money to a guardian to celebrate the marriage of her minor child in violation of the Child Marriage Restraint Act, 1929, which Act not only prohibits such marriage but makes it also penal has the object of enabling the guardian to perform an act which is illegal as well as contrary to the public policy. The purpose of the borrowing being thus unlawful as well as opposed to public policy, the lending is hit by Section 23 of the Contract Act, though such marriage when celebrated may not be void.³ Money advanced for effecting bribery is not recoverable.⁴

Consequence of illegality.—Where the object of an agreement is directly or indirectly to commit a crime or a tort or to defraud a third person it is illegal and totally ineffective.⁵ A party or his representative cannot benefit from such a contract.⁶ The parties to an illegal contract are not liable to punishment for their entering into such a contract, except where the statutory or common law of the country makes the entering into such contract, *per se*, punishable.⁷ When a contract is illegal to the very core of

1. *Fisher v. Bridges* (1854), 3 E. & B. 642; *Redmond v. Smith* (1844), 7 Man. & G. 457; *Jennings v. Hammond* (1882), 9 Q.B.D. 225; *Ratanlal v. Firm Mangilal*, A.I.R. 1963 M.P. 323.

2. *Fisher v. Bridges* (1854), 3 E. & B. 642; *Jennings v. Hammond* (1882), 9 Q.B.D. 225; *Cannan v. Bryce* (1819), 3 B. & Ald. 179; *Ratanlal v. Firm Mangilal*, A.I.R. 1963 M.P. 323.

3. *Chandra Sreenivasa v. Rama Mohana*, A.I.R. 1952 Mad. 579; *Moti v. Beni*, A.I.R. 1936 All. 852; 38 Cr.L.J. 301; *Ram Baran v. Sital*, A.I.R. 1939 All. 340; 182 I.C. 568; *Khalilur Rahman v. King-Emperor* (F.B.), 11 Rang. 213; A.I.R. 1933 Rang. 98; 34 C.L.J. 696; *Ram Jash v. Chand Mandal*, (1937) 2 Cal. 764; 41 C.W.N. 1176.

4. *Protima v. Dukhia* (1872), 9 B.L.R. App. 38.

5. *Allen v. Reseous* (1676), 2 Lev. 174; *Fores v. Johnes* (1802), 4 Esp. 97; *Waldo v. Martin* (1825), 4 B. & C. 319; *Begbie v. Phosphate Sewage Co.*, (1875) L.R. 10 Q.B. 491; *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; *Apthorp v. Neville & Co.* (1907), 23 T.L.R. 575; *Berg v. Sadler and Moore*, [1937] 2 K.B. 158; [1937] 1 All E.R. 637.

6. *In the Estate of Crippen*, [1911] P. 108; *Beresford v. Royal Insurance Co., Ltd.*, [1937] 2 K.B. 197; [1937] 2 All E.R. 243 *affd*, [1938] A.C. 586; [1938] 2 All E.R. 602.

7. *A-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781, 797.

it, the parties do not get any help from the Court for its recognition or even for the recognition of any transaction that has arisen as collateral to the illegal contract. As to collateral contracts see, above. See also under Section 30, below. See also *Collateral security, post*.

Where a contract is to do a thing which cannot be performed without a violation of the law it is void whether the parties know the law or not.¹ Where a contract can be legally performed but there was an intention to perform it in an illegal manner, in order to avoid such contract it is necessary to show that there was the intention to break the law; the knowledge of what the law is also becomes important.² Where a contract is *ex facie* lawful, and a party is ignorant of the other's unlawful design, the former is not precluded from his remedies.³ If money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering.⁴ Where however the plaintiff knew that the subject-matter of the contract was supplied for the purpose of being used by the defendant for an illegal purpose, he would be non-suited. When once a contract has been entered into, and afterwards it appears to a party that the other party has had some unlawful object in view, the innocent party may stop its execution, if any due.⁵ Where a contract, though *ex facie* legal has subsequently been discovered by a party to be illegal, because of the illegal intention of the other party, he can sue the latter for breach of contract and damages.⁶ The innocent party can recover the stipulated amount when he has completed his part of the contract without knowing of the unlawful intention of the other party. He can also in case of part performance sue on a quantum meruit.⁷ Where it is a question of property, the innocent party may rescind the contract and recover the property handed over subject however to the rights of an innocent third party for value.⁸ The party with the unlawful intention has no remedy in law.⁹ Where a contract was not illegal in its inception but an illegality was committed, during the course of its performance, then the offending party will not be entitled to sue on such contract. The innocent party will not be deprived of any of his rights. Thus, when a contract was not unlawful when it was made, and a party repudiates it before the time for its performance has

1. *Nash v. Stevenson Transport, Ltd.*, [1936] 2 K.B. 128; [1936] 1 All E.R. 906.

2. *Waugh v. Morris* (1873), L.R. 8 Q.B. 202, 208; *Hindley & Co., Ltd. v. General Fibre Co., Ltd.*, [1940] 2 K.B. 517.

3. *Bowry v. Bennett* (1808), 1 Camp. 348; *Lloyd v. Johnson* (1798), 1 Bos. & P. 340.

4. *Pearce v. Brooks* (1866) L.R. 1 Exch. 213; *Cannan v. Bryce* (1819), 3 B. & Ald. 179; *Upfall v. Wright*, [1911] 1 K.B. 506.

5. *Cowan v. Milbourn* (1867), L.R. 2 Exch. 230.

6. *Millward v. Littlewood* (1850), 5 Exch. 775; *Spiers v. Hunt*, [1908] 1 K.B. 720.

7. *Clay v. Yates* (1856), 1 H. & N. 73.

8. *Alexander v. Rayson*, [1936] 1 K.B. 169.

9. *Berg v. Sadler & Moore*, [1937] 2 K.B. 158; [1937] 1 All E.R. 637; *Edler v. Auerbach*, [1950] 1 K.B. 359; [1949] 2 All E.R. 692.

arrived, either of the parties can sue the other for damages. This is so because the contract itself when made was not unlawful, but its performance becomes, because of the non-fulfilment of some statutory requirements, unlawful. The illegality which destroys the cause of action has not yet arisen. When the illegality which destroys the cause of action has already arisen, the guilty party cannot avail himself of the contract. Where however the breach of the law has not been tainted with any turpitude such party is entitled to refer to such contract in any other independent cause of action.¹

Money paid in pursuance of an illegal contract may be recovered if the payer repents before the time for performance, but not if he does so afterwards.² On the frustration of an illegal contract see *Bigos v. Bousted*, [1951] 1 All E.R. 92.

Where the defendant as the agent of the plaintiff received an amount of money on his behalf, he was bound to pay over the amount to the plaintiff. The illegality of the transactions between the principal and his debtor will not affect the question at all. The rule founded on the maxim *ex turpi causa non oritur actio* does not apply to the case of an agent and his principal.³

Where a contract is illegal to the core because of turpitude and both parties are aware of the illegality, then neither party can claim any right or obtain any remedy.⁴ The Court will not enforce an illegal contract. When the illegality of a contract or transaction is brought to the notice of the Court, it will not allow itself to be made the instrument of enforcing the obligations alleged to arise out of the said contract or transaction. If the person invoking the aid of the Court is himself implicated in the illegality, the Court will not render its assistance to him.⁵ No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.⁶

Where a contract is fundamentally illegal and not simply void, as in case, say, of mistake, the Court will not lend its aid to a party who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then such a party has no right to be assisted by the Court. The defendant in the circumstances benefits; but he benefits not because the Court assists him as defendant but because it

1. *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; *Marles v. Philip Trant & Son, Ltd.*, [1954] 1 Q.B. 29; [1953] 1 All E.R. 651.

2. *Harry Parker, Ltd. v. Mason*, [1940] 2 K.B. 590.

3. *Babulal Swarupchand v. South Satara (Fixed Delivery) Merchant's Association, Ltd.*, A.I.R. 1960 Bom. 548.

4. *Gordon v. Metropolitan Police Commissioner*, [1910] 2 K.B. 1080.

5. *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Miller Karlinski*, (1945), 62 T.L.R. 85; *Bostel Bros., Ltd. v. Hurlock*, [1948] 2 All E.R. 312; *Dennis & Co., Ltd. v. Munn*, [1949] 2 K.B. 327; [1949] 1 All E.R. 616; *Smith A. & Son (Bognor Regis), Ltd. v. Walker*, [1952] 2 Q.B. 319; [1952] 1 All E.R. 1008; *David Taylor & Son, Ltd. v. Barnest Trading Co.*, [1953] 1 All E.R. 843.

6. *Holman v. Johnson* (1775), 1 Cowp. 341, 345; *Palaniappa v. Arunasalam*, [1962] 2 W.L.R. 548 P.C.

refuses its assistance to the plaintiff in a given fact-situation. If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the Court will not assist him in his cause of action.¹ If the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it. In the circumstances, the plaintiff whichever side of the contract he may represent, is denied the aid of the law because of the public policy of the law : *ex dolo malo non oritur actio* ; and when both the parties are equally in fault, the defendant benefits because of the public policy : *potior est conditio defendentis*.²

The general rule that money paid or property transferred in a fundamentally illegal contract cannot be recovered is subject to the rule that such money or property though paid or transferred can be recovered if the plaintiff can found his claim upon a cause of action without the basis of the said fundamentally illegal contract.³ Apart from the case where the plaintiff would be able to found his claim upon a cause of action independent of the fundamentally illegal contract, a party can also in certain circumstances recover the money paid or property transferred under an illegal contract. Where the parties are not equally guilty, *in pari delicto*, the less guilty person is, in certain cases, allowed to recover his money or property. The party to benefit from this rule of comparative guilt has to prove fraud, duress, coercion, undue influence, and such other considerations moving from the other party to the illegal contract.⁴ When both the sides to a contract, which is, *per se*, illegal, have not been on the same footing as regards the making of the said contract, the parties will not be considered as being *in pari delicto* or equally at fault. Thus there may be cases of illegal contract where both the parties are *in delicto*, but the act is not *par delictum*, because the one has the power to dictate, influence, or mislead the other and the latter has no alternative but to submit.⁵ As a matter of general policy, the State may sometimes seek to protect a particular class of its citizens from the rigours of onerous contracts which the said particular class of citizens may by their circumstances be compelled to enter into. A certain class of contracts may, therefore, be also declared illegal in view of their transgressing the statutory provisions that may have been enacted for the protection of the said class of citizens. The protected person thus though *in pari delicto* with the other

1. *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 ; *Taylor v. Chester* (1869), L.R. 4 Q.B. 309 ; *Sykes v. Beadon* (1879), 11 Ch.D. 170 ; *Parkinson v. College of Ambulance, Ltd. and Harrison*, [1925] 2 K.B. 1 ; *Vilayat Husain v. Misran*, (1923) 45 All 396.

2. *Sinclair v. Brougham*, [1914] A.C. 398 ; *Holman v. Johnson* (1775), 1 Cowp. 341.

3. *Gas Light & Coke Co. v. Turner* (1840), 6 Bing. (N.C.) 324 ; *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 ; *Alexander v. Rayson*, [1936] 1 K.B. 169 ; *Fajbhay v. Cassim*, [1939] App. D. 537 ; *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1945] K.B. 65 : [1944] 2 All E.R. 579.

4. *Harse Pearl v. Life Assurance Co.*, [1904] 1 K.B. 558 ; *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K.B. 482.

5. *Smith v. Cuff* (1817), 6 M. & S. 160 ; *Atkinson v. Denby* (1862), 7 H. & N. 934.

party is allowed to recover his money or property paid or transferred in consequence of an illegal contract or transaction. The contract or transaction in question is illegal because it is prohibited by a positive statute for the sake of protecting one set of men from another set of men. Because the former set, from their situation and condition, is liable to be oppressed or imposed upon by the latter, the parties to the illegal contract are not considered as being *in pari delicto*. In furtherance of the general policy of the State, the person injured, after the transaction is finished and completed, is allowed to bring his action and defeat the contract. Subject to any statutory provision, the relief to be granted to the plaintiff may be made dependent on terms which he may be required by the Court to fulfil. When, again, the obligation imposed upon a party was intended, under statutory provisions, for the benefit of the public and thus a breach of the statutory duty was a public and not a private wrong, civil liability will not be fastened on the party at fault in an action by the plaintiff. In such cases only the statutory sanction is deemed adequate.¹

There is yet another rule that if money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.² Court does not punish intention to defraud.³ An opportunity is thus given to a party to recover his money or property while the contract is still at its executory stage. In the more recent decisions a party has been allowed to recover his money or property paid or delivered in course of an illegal contract if as the plaintiff he brings an action before the illegal purpose has been substantially performed. The plaintiff though a party to an illegal contract and though *in pari delicto* with the defendant is thus allowed an opportunity to repent (*locus poenitentiae*) and withdraw himself from the transaction. Where, therefore there has been a partial carrying into effect of an illegal purpose in a substantial manner, the law will not allow the plaintiff, though there remains something not performed, to recover back the money paid or property delivered under the illegal contract.⁴ Thus where a sum of money has been deposited with the stakeholder in order to be handed over to the winner, it can be recovered back by the party depositing it before

1. *Browning v. Morris* (1778), 2 Cowp. 790; *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; *Cohen v. Lester (J.) Ltd.*, [1939] 1 K.B. 504; [1938] 4 All E.R. 188; *Cutler v. Wandsworth Stadium, Ltd.*, [1949] A.C. 398; [1949] 1 All E.R. 544; *Gray v. Southouse*, [1949] 2 All E.R. 1019; *Green v. Portsmouth Stadium, Ltd.*, [1953] 2 Q.B. 190; [1953] 2 All E.R. 102.

2. *Taylor v. Bowers*, (1876) 1 Q.B.D. 291; *Bindeshari v. Lekhraj* (1915-16) 20 C.W.N. 760; *Goberdhan v. Ritu Roy*, (1896) 23 Cal. 962; *Jahed Shaikh v. Kamalesh*, A.I.R. 1959 Cal. 165; *Asaram v. Ludheshwar*, (F. B.), A.I.R. 1938 Nag. 335.

3. *Girdharlal v. Manikamma*, (1914) 38 Bom. 10.

4. *Kearley v. Thomson*, (1890), 24 Q.B.D. 742; *Re National Benefit Assurance Co. Ltd.*, [1931] 1 Ch. 46; *Harry, Parker, Ltd. v. Mason*, [1940] 2 K.B. 590; [1940] 4 All E.R. 199; *Vilayat Husain v. Misran*, (1923) 45 All. 396; *Goberdhan v. Ritu Roy*, (1896) 23 Cal. 962; *Girdharlal v. Manikamma*, (1914) 38 Bom. 10; *Honapa v. Narsapa*, (1899) 23 Bom. 406.

it has actually been handed over. A notice to stop payment to the stakeholder is also binding on him.¹ The judicial decisions, however, could not always exactly prescribe as to the point of time up to which the plaintiff will be allowed to repent, that is, to withdraw himself from the illegal purpose in order to be entitled to recover the money paid or goods or property delivered.²

Courts should not enforce illegal contracts even if the illegality has not been pleaded by the defendant. The maxim *ex turpi causa non oritur actio* is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.³ Once the facts which made the contract illegal become apparent to the Court, it is the Court's duty, whether illegality was or was not raised by the parties, to refuse to enforce the agreement in question. The decision in *Taylor v. National Amalgamated Approved Society*, [1914-15] All E.R. Rep. 869, is held wrong in principle and should be regarded as overruled by later cases.⁴ When a contract was illegal at the time of its formation it cannot be enforced even at a time when the relevant provision of the law ceases to be effective.⁵

Where a litigant has agreed to give property to a certain person in consideration of the latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for it is opposed to public policy and is therefore illegal.⁶

The equitable maxim of *in pari delicto* and the related one of *ex dolo malo non oritur actio* are limited in their application. They apply to illegal or immoral transactions or to others which it would be against public policy to countenance. The *Robkars* issued by the Ruler of the quondam Ratlam State forbade the jagirdars of the third grade from giving leases and contracts

1. *Barclay v. Pearson*, [1893] 2 Ch. 154; *Greenberg v. Cooperstein*, [1926] Ch. 657; *Hastelow v. Jackson* (1828), 8 B. & C. 221.

2. *Kearley v. Thomson* (1890), 24 Q.B.D. 742; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Berg v. Sadler and Moore*, [1937] 2 K.B. 158; [1937] 1 All E.R. 637; *Bigos v. Bousted*, [1951] All E.R. 92.

3. *Ko Pa Tu v. Azimulla*, A.I.R. 1940 Rangoon 73; *Alice Mary Hill v. William Clarke*, 27 All. 266; 1 A.L.J. 632; *Scott v. Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724; 61 L.J. Q.B. 738; 67 L.T. 782; 41 W.R. 116; *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214; 69 L.J. Q.B. 506; 82 L.T. 463; 16 T.L.R. 344; *Asaram v. Ludheshwar (F.B.)*, A.I.R. 1938 Nag. 335.

4. *Snell v. Unity Finance, Ltd.*, [1963] 3 All E.R. 50 C.A. See also *per Diplock L.J.*, page 61.

5. *Sita Ram v. Kunj Lal*, A.I.R. 1963 All. 206.

6. *Ko Pa Tu v. Azimulla*, A.I.R. 1940 Rangoon 73.

of forest area in their jagirs. The defendant though a jagirdar of the third grade granted the plaintiff a lease of a forest area in his jagir in consideration of a certain premium. When the said incapacity came to the knowledge of the plaintiff he claimed the refund of the consideration paid by him and the recovery of the expenses incurred for working the contract as well as of damages. In the circumstances it was held that the *Robkars* imposed an incapacity on the jagirdars of the third grade only in relation to jagir forests, and no general incapacity on them to contract. The consideration or the object of the contract in question was neither unlawful nor illegal or immoral. The contract in question was void not because it was hit by Section 23 of the Contract Act but because it was entered into by the defendant who had no authority to grant leases of forest areas in a jagir. It thus fell within the terms of Section 65 of the Contract Act and the money that the plaintiff advanced on it was recoverable.

In *Immani Appa Rao v. Ramalingamurthi*, [1962] 3 S.C.R. 739: A.I.R. 1962 S.C. 370, (a case under the Transfer of Property Act, 1882), the transferor and the transferee were in equal fraud in carrying out the transfer to defraud the creditors of the transferor, and the fraud was carried out; but the possession remained with the transferor. In the suit by transferee for possession, it was held open to the transferor to plead fraud and the absence of consideration. Gajendragadkar, J., (later C. J.), rightly observed, [1962] 3 S.C.R., at page 749: A.I.R. 1962 S.C., at page 375, that most legal maxims were vague and too general to admit of application without a careful consideration of the circumstances of a given fact-situation.¹ In considering which of the conflicting maxims, where any, should be applied in a given case, the Court's selection should be conditioned solely by considerations of public policy. The principle considered to be more conducive to and more consistent with, public interest will be adopted. In the words of Pitt Taylor, *Treatise on the Law of Evidence*, 12th edition, 1931, vol. I, page 89, para. 93, the better opinion seems to be, that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void *ab initio*, for although a party will thus, in certain cases, be enabled to take advantage of his own wrong, yet this evil is of a trifling nature in comparison with the flagrant evasion of the law that would result from the adoption of an opposite rule. Story, too, in his *Commentaries on Equity Jurisprudence*, 3rd English edition, 1920, page 123, para. 298, observes that in general (for it is not universally true), where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis, et possidentis*. But in cases where the agreements or other transactions are repudiated on account of their being against

1. See *Surasabailini v. Phanindra*, A.I.R. 1965 S.C. 1364.

public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in equity *material*. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party. The suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other. Relief is not granted where both parties are truly *in pari delicto*, unless in cases where public policy would thereby be promoted.

Section 65 applies to the case of a contract of transfer of property which is void because of the incapacity of the transferor to transfer the property concerned. The purchaser of a mere right of reversion may thus sue for the refund of consideration when he has discovered subsequently that the sale was void because the vendor was incompetent to convey any title. Section 65 applies to a case where the vendee was not aware of the true nature of the vendor's right till after the date of the sale-deed.¹ The incapacity imposed upon a judgment-debtor by para. 11 of Schedule 3 of the Code of Civil Procedure is an incapacity to affect that property of his which was under the Collector's management and not a general incapacity to contract and a covenant, where any, to refund or repay is not made void by the operation of that paragraph and is, therefore, enforceable under Section 65.²

Courts refuse to give relief to a party to an illegal contract who either founds his cause of action upon it or who has necessarily to disclose or plead its illegality to sustain his cause of action.

An agreement the object or consideration of which is unlawful as defined by Section 23 is unlawful and void. In general a *particeps criminis* cannot obtain refund of money paid under an unlawful agreement.³

Where the mortgagee is not aware that the daughter for whose marriage the debt was contracted by her father by executing the mortgage was a minor it cannot be said that the mortgagee's object in lending the amount was unlawful or that the provisions of the Child Marriage Restraint Act were to be contravened.⁴ Money advanced for a legal second marriage is recoverable.⁵ Money advanced for effecting bribery is not recoverable.⁶ Money given for giving evidence true or false is not recoverable.⁷ Rent of

1. *Umar v. Shivdarsingh*, A.I.R. 1958 M.P. 88; *Harnath v. Indar*, 45 All. 179: A.I.R. 1922 P.C. 403; *Ananda Mohan v. Gour Mohan*, 50 Cal. 929: A.I.R. 1923 P.C. 189.

2. *Umar v. Shivdarsingh*, A.I.R. 1958 M.P. 88; *Mohan v. Manzoor*, 18 Luck. 130: A.I.R. 1943 P.C. 29; *Sunderlal v. Laxmanprasad*, (1949) Nag. 52: A.I.R. 1949 Nag. 292; *Saraswatibai v. Madhukar*, (1950) Nag. 467: A.I.R. 1950 Nag. 229.

3. *Pranballav v. Tulsibala*, A.I.R. 1958 Cal. 713; *Protima v. Dukhia*, (1872) 9 B.L.R. App. 38; *Bai Vijli v. Nansa Nagar*, (1887) 10 Bom. 152; *Mt. Roshun v. Muhammad*, (1887) Punj. Rec. 46; *Vilayat Husain v. Misran*, (1923) 45 All. 306.

4. *Sadasiva v. Rattain*, A.I.R. 1958 Andhra 145.

5. *Behari v. Ude Singh*, A.I.R. 1929 Lah. 373.

6. *Protima v. Dukhia*, (1872) 9 B.L.R. Appx. 38.

7. *Sashanna v. Ramasamy*, (1868) 4 M.H.C. 7.

lodgings knowingly let for prostitution is not recoverable.¹ The rent would be recoverable if the landlord did not know of the nature of the business that would be carried there.² Where two people together had the common design to use a subject-matter for an unlawful purpose so that each participated in the unlawful purpose, then the contract for its hiring for that use was illegal in its formation, and it was no answer for them to say that they did not know that the purpose was unlawful. The contract having been illegal, no action lay to recover the rent.³

Money lent for continuing immoral cohabitation is not recoverable.⁴ Money lent to a prostitute to enable her to carry on her business is not recoverable.⁵ Ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution are not recoverable.⁶

Where it was found on the facts that a deed was *benami* and fraudulent and thus inoperative as against the plaintiff, but the fraud was not effected, there was nothing to prevent the plaintiff from repudiating the transaction as *benami* and recovering possession of the property.⁷

Where the plaintiff did not know the agreement to suppress criminal prosecution and advanced money to the defendant, there was nothing unlawful in the transaction between him and the defendant.⁸

No refund of money or return of security, given under an agreement not to prosecute a criminal case, will be allowed unless circumstances disclose pressure or undue influence, Mere fear of punishment in a criminal case does not constitute undue influence.⁹

Where the suit was not by one member of an illegal Association or to recover his share of the assets of an illegal body, but was one brought by the plaintiff, who was a creditor and who was not aware of the illegality of the Association, to recover the balance due on an account of his transactions with the defendants it was maintainable.¹⁰

The price of the opium supplied to the defendant in contravention of the Opium Act, 1878, could not be recovered inasmuch as advances made for an

1. *Gaurinath Madhumani Peshakar*, (1872) 9 B.L.R., Appx. 37; *Pirithi Mal v. Bhagan*, (1898) Punj. Rec. 2; *Brinkman v. Abdul Ghafur*, (1904) Punj. Rec. 65; *Bani Mancharam v. Regina Stanger*, (1907) 23 Bom. 581; *Choga Lal v. Piyari*, (1908) 31 All. 58.

2. *Sultan v. Nanu*, (1877) Punj. Rec. 22.

3. *J. M. Allan Ltd. v. Cloke*, [1963] 2 All E.R. 258 C.A.

4. *Pannichand v. Nanoo*, (1908) 18 M.L.J. 456.

5. *Bholi Baksh v. Gulia*, (1876) Punj. Rec. 64; *Kali Kumari v. Mono Mohini*, A.I.R. 1935 Cal. 748; 160 I.C. 212; *Gangamma v. Kuppanmal*, (1938) 61 Mad. 789; 183 I.C. 680; A.I.R. 1939 Mad. 139.

6. *Alla Baksh v. Chunia*, (1877) Punj. Rec. 26. *Pearce v. Brooks* (1866), L.R. 1 Ex. 213.

7. *Petherpermal v. Muniandy*, (1908) 35 Cal. 551 P.C.; *Taylor v. Bowers*, (1876) L.R. 1 Q.B.D. 291; *Symes v. Hughes* (1870), L.R. 9 Eq. 475, 479; *In re Great Berlin Steamboat Co.* (1884), L.R. 26 Ch.D. 616 *relied on*.

8. *Rajkristo v. Koylash*, (1882) 8 Cal. 24.

9. *Amjadnessa v. Rahim Buksh*, (1915) 42 Cal. 286.

10. *Appa Dada v. Ramkrishna*, (1929) 53 Bom. 652.

illegal purpose subsequently carried out cannot be recovered.¹

Where a person lends money to a partnership which is an illegal one or forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, a suit by him to recover the amount so lent is not maintainable.²

Where a deposit has been made in connection with an illegal contract such deposit can be recovered by a suit, if the plaintiff does not rely for his claim on the illegal contract.³

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrating a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the Court to give him some help) and that of the defendant, the duty of the Court is not to assist either party.⁴

The money due under an illegal or immoral agreement cannot be recovered by a change in the form of action based on another agreement which is naturally connected with or has for its support the original illegal agreement. Whether the plaintiff has to rely upon the illegal agreement, or whether it is brought out by the defence is immaterial; all that is material is the intimate connexion between the two.⁵

Where the defendant borrows money from the plaintiff with the clear intention of utilising the money for the purpose of gambling but there is nothing to indicate that the plaintiff was privy to this intention, there is nothing to preclude the plaintiff from recovering the amount from the defendant by suit.⁶

In *Sajan Singh v. Sardara Ali*, [1960] 2 W.L.R. 180 P.C., the contract for the sale of a lorry was unlawful. In pursuance of such a contract the lorry was however sold and delivered to the plaintiff by the defendant. Subsequently, the defendant removed the lorry from the plaintiff's possession without his consent and refused to return it. On a claim by the plaintiff against the defendant for the return of the lorry or its value, it was held that the property in the lorry having passed to the plaintiff he derived the right to immediate possession of the lorry. Such a right entitled him to sue the defendant in trespass or detinue without relying on the unlawful contract.

1. *Raghunath v. Nathu Hirji*. (1895) 19 Bom. 626.

2. *Vairava v. Pothikachala*, A.I.R. 1936 Mad. 603.

3. *Liladhar v. Sunderlal*, A.I.R. 1932 Nag. 32.

4. *Vilayat Husain v. Misran*, (1923) 45 All. 396; *Raghupati v. Nrishingha*, (1922) 71 I.C. 1.

5. *Kali Kumari v. Mono Mohini*, A.I.R. 1935 Cal. 748.

6. *Pragilal v. Ratan Lal*, A.I.R. 1931 All. 458.

Accordingly, the plaintiff's claim succeeded.¹ Where the plaintiffs were not seeking to enforce the original contract which was illegal under Section 23 of the Indian Contract Act but they were calling upon the defendant to render an account for the amount received by him, for and on behalf of the plaintiffs under Section 218, their claim to recover their proportionate share in the amount received by the defendant was allowed.²

Forbidden by law.—When the consideration or object of an agreement is forbidden by law it is an unlawful consideration or object. An agreement of which the object or consideration is unlawful is void, that is, unenforceable.³ Sections 26, 27, 28 and 30 of the Contract Act, in addition to the general provisions of Section 23, illustrate cases where the consideration or object of an agreement is considered unlawful. As to details see those Sections. An agreement may be void, that is, unenforceable on other grounds as well. Section 25 lays down that with certain exceptions an agreement without consideration is void, that is, unenforceable. Section 29 lays down that an agreement the meaning of which is not certain or not capable of being made certain is void, that is, unenforceable.

A promises to obtain for *B* an employment in the public service, and *B* promises to pay Rs. 1,000 to *A*. The agreement is void as the consideration for it is unlawful. *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

Where the lawful wife was alive any agreement by the husband to marry another is unenforceable as being contrary to public policy. Even when the given persons go through a ceremony of marriage they will not be deemed to have been lawfully married. By a person promising to marry another the former impliedly warrants that he was in a position to do so, and as such he is liable for damages for the breach of the said implied warranty. Where the person giving the warranty has died the person damaged will be entitled to special damages.⁴ As it has been observed in *Harbajan v. Smt. Brij Bilab*, A.I.R. 1964 Punj. 359, force or fraud as under Section 12 of the Hindu Marriage Act, 1955, will invalidate a Hindu marriage, which is a sacrament and not contract *simpliciter*. Fraud render Section 17 of the Indian Indian Contract Act, by itself may not render a Hindu marriage voidable in all circumstances. See also *Kshitish v. Emperor*, A.I.R. 1937 Cal. 214 (F. B.).

A contract which serves to ensure peace and domestic happiness should not be disregarded as invalid and opposed to public policy.

Thus, in an ante-nuptial contract embodied in a '*kabinnama*' that in case the husband brings any of his other wives to stay with him along with the plaintiff (the third wife), without her consent she (the plaintiff) will be at

1. *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1945] K.B. 65 : 61 T.L.R. 62 : [1944] 2 All E.R. 579 approved.

2. *Shivram v. Viswanath*, (1956) 58 Bom. L.R. 154.

3. *Suwalal v. Clive Mills Co.*, A.I.R. 1960 Cal. 90.

4. *Shaw v. Shaw & anr.*, [1954] 2 All E.R. 638 C.A.

liberty to exercise the right of divorce, is quite in accord with reason and public policy and it should be enforced. Such contract is not hit by the provisions of Section 23. It is a valid and reasonable contract because all that it seeks to do is to give a right to the plaintiff to seek divorce and live apart from the defendant and his other co-wives in case they choose to live together.¹

An ante-nuptial agreement by a Muhammadan husband in a *kabinnama* that he would pay separate maintenance to his wife in case of disagreement and that the wife would have power to get herself divorced in case of failure to pay maintenance for a certain period is not opposed to public policy and is enforceable under the Muhammadan law.²

When an agent for purchase knows at the time he makes the purchase that the goods he is instructed to buy are to be dealt with in a manner prohibited by law, he cannot enforce any right arising out of the contract of agency. Such a case is covered by Section 23 of the Contract Act. Thus, where the plaintiff acting as the commission agent of the defendant purchased chillies on behalf of the defendant and they were to be transferred to the latter outside the district and the plaintiff knew that the Collector of the District had issued a notification under Rule 81 of the Defence of India Rules prohibiting the transport of chillies, it was held that the object of the contract of agency was unlawful and the plaintiff could not recover anything under the contract.³

"There was nothing to prevent a *watandar* when mortgaging *watan* property, although the mortgage admittedly would not be effective beyond the life time of the *watandar* mortgagor in ordinary circumstances, from personally covenanting to pay the mortgage amount."⁴ A condition in an insurance policy limiting period for suit is generally considered as not being against Section 23 or 28.⁵ Where under terms of service it was incumbent for the servant to give the master a notice of 15 days failing which he would not be entitled to the wages due, the agreement was enforceable.⁶ When certain forward contracts were not void *ab initio* but became void and unenforceable due to prohibition of law, there was no bar to their enforcement when the inhibition was lifted by the repeal of that law.⁷ In given circumstances the fact that

1. *Saifuddin v. Soneka Bibi*, A.I.R. 1955 Ass. 153; *Mirjan v. Maimuna*, (1949) Assam 146; A.I.R. 1949 Assam 14; *Buffatan v. Abdul*, (1951) 1 Cal. 476; A.I.R. 1950 Cal. 394; *Maharam Ali v. Ayesa Khatun*, 19 C.W.N. 1226; A.I.R. 1916 Cal. 761; *Mahammad Amin v. Amina*, 132 Ind. Cas. 578; A.I.R. 1931 Lah. 134; *Sadiqua v. Ata Ullah*, A.I.R. 1933 Lah. 885 *relied on*; *Bai Fatima v. Ali Mahomed*, 17 Ind. Cas. 946; 37 Bom. 280 doubted.

2. *Buffatan Babi v. Abdul Salim*, A.I.R. 1950 Cal. 304.

3. *Krishna Rao v. Kodandarama*, A.I.R. 1960 Andhra 190.

4. *Vithoba Mahipati v. Balkrishna Sakharam*, (1921) 45 Bom. 1206.

5. *Girdharilal v. Eagle Star Insurance Co.*, A.I.R. 1924 Cal. 186. For a discussion *see* under Section 28, *post*.

6. *Aryodaya Spinning & Weaving Co. Ltd. v. Siva Virchand*, (1911) 13 Bom. L.R. 19.

7. *Hagami Lal v. Bhuralal*, A.I.R. 1961 Raj. 52.

it may be known to one of the parties at the time of making the contract that he cannot perform it legally and therefore that it will inevitably be broken, does not make the contract itself illegal. Where the contract thus entered into is not *ex facie* illegal, public policy will not constrain the Court to refuse aid to the plaintiff who did not know that the contract would be performed illegally.¹ Where the purchaser was affected with notice of the impropriety of the sale, and bought at his own risk, notwithstanding the proviso in the mortgage and the provisions of Section 69 of the Transfer of Property Act, 1882, the circumstances invalidated the sale.²

Contracts prohibited by statutes.—A contract may be prohibited by statute expressly or impliedly. A contract thus prohibited is illegal.³ Where the specific performance of an agreement violates a statutory provision it will not be granted. Section 23 of the Contract Act will be a bar to the suit for specific performance.⁴ Where the object of the legislation was not to prohibit a contract, the contract will not be illegal. Had the contract been prohibited no action would lie on such contract. Where the object was not to vitiate the contract itself, but, say, only to impose a penalty upon the party offending for the purposes of the revenue, the contract is not illegal but may be sued on.⁵

Where the object or one of the objects of a statute is to protect the public or to promote an object of general policy, any non-compliance with the statutory requirements renders the contract illegal.⁶ Because of statutory requirements, the illegality in a contract may arise in connection with its formation as well as with its performance. Where the parties have agreed to something which is prohibited, the contract is unenforceable by either party. A contract may be equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner. If a printer, for example, employed to print a book delivers it without his name being affixed to it as required by the statute in that behalf, the party so printing the book is not entitled to any remuneration for his services, which are *ex hypothesi* illegal, and ought

2. *Archboulds (Freightage) Ltd. v. Spanglett Ltd.* Randall (Third Party), [1961] 2 W.L.R. 170 C.A. Dictum of Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277, 293 : 35 T.L.R. 402 : [1939] 1 All E.R. 513 P.C. applied.

3. *Chabildas Lallubhai v. Dayal Mowji*, (1907) 31 Bom. 566 P.C.

4. *Cope v. Rowlands* (1836), 2 M. and W. 149; *Re Mahmoud and Isphani*, [1921] 2 K.B. 716; *Abdul v. Rent Control and Eviction Officer*, A.I.R. 1959 All. 440; *Hormosji Motabhai v. Pestanji Dhanjibhai*, (1888) 12 Bom. 422; *Rama Rao v. Suryanarayana*, A.I.R. 1964 Andhra 156.

5. *Narasappa v. Hazrat*, A.I.R. 1960 Mysore 59.

6. *Smith v. Mawhood* (1845), 14 M. and W. 452; *Learoyd v. Bracken*, [1894] 1 Q.B. 114.

7. *Mukul v. I. A. C.*, A.I.R. 1962C al. 311; *R. v. Bham*, [1965] 3 All E.R. (marriage).

not to have been rendered in the form in which they were rendered.¹

Certain classes of contracts are expressly declared by statute to be void. In England the deferred pay or pension of the army, air force, or naval personnel cannot be assigned.² Similarly, any assignment or contract to assign the pensions of policemen, firemen, school teachers and even old age pensions is prohibited in England. The English Banking Companies (Shares) Act, 1867, provides that a contract for the transfer of any shares or other interest in a joint-stock banking company shall be null and void unless it states in writing the numbers of the shares, or if they are not registered by distinguishing numbers, the name of the person who is entered as the proprietor in the register of the company.

While under Section 2(h), *ante*, we have seen how some of the Indian statutes have prescribed a particular mode of assignment or transfer of shares in possession and suspense. Without the observance of the prescribed statutory requirements the assignment or transfer will be void, that is, unenforceable. Non-compliance with statutory requirements sometimes not only renders the transaction unenforceable but also illegal.

Sections 20 and 23 to 30 of the Indian Contract Act declare certain contracts to be void. To take a few more examples of statutory provisions declaring a contract to be void. Section 4 of the Indian Trusts Act, 1882, lays down :

"A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful, and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation.—In this Section the expression "law" includes, where the trust-property is immovable and situate in a foreign country, the law of such country."

The Indian Stamp Act, 1899, Section 7, required, except in some given cases, a contract for sea-insurance to be expressed in a sea-policy specifying particular details. As to marine insurance policies, now see the Marine Insurance Act, 1963, Sections 24-26.

Any contract or agreement whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment, is null and void in so far as it purports to remove

1. *Little v. Poole* (1829), 9 B. and C. 192; *Cundell v. Dawson* (1847), 4 C.B. 376; *Victorian Dayleford Syndicate v. Dott*, [1905] 2 Ch. 624; *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; *B. and B. Viennese Fashions v. Losane*, [1952] 1 All E.R. 909.

2. The English Army Act, S. 141; Air Force Act, S. 12 (1); Naval and Marine Pay and Pensions Act, 1865, S. 4.

or reduce the liability of any person to pay compensation under the Workmen's Compensation Act, 1923.¹

The Tea Districts Emigrant Labour Act, 1932, lays down :

"An emigrant labour may, by agreement with his employer, postpone his exercise of the right of repatriation, or may waive it conditionally or unconditionally, but no such agreement shall be valid unless it is in writing and in the prescribed form and has been made not more than one month before the right of repatriation arises .

Provided that the Central Government may, by notification in the Official Gazette, make rules requiring that in any area such agreement shall be made in the prescribed manner before a prescribed authority and that the prescribed authority, if satisfied that the labourer understands the terms of his agreement, and his rights in regard to repatriation, shall ratify the agreement :

Provided further that after such rules come into force no such agreement shall be valid unless it is so made and ratified."²

Under Section 3 of the Children (Pledging of Labour) Act, 1933, an agreement to pledge the labour of a child shall be void. 'Child' under the Act means a person who is under the age of fifteen years.³

"An agreement to pledge the labour of a child" means an agreement, written or oral, express or implied, whereby the parent or guardian of a child, in return for any payment or benefit received or to be received by him, undertakes to cause or allow the services of the child to be utilised in any employment :⁴

Provided that an agreement made without detriment to child, and not made in consideration of any benefit other than reasonable wages to be paid for the child's services, and terminable at not more than a week's notice, is *not an agreement* within the meaning of this definition.

Any provision contained in a contract of service or apprenticeship, or in an agreement collateral thereto, shall be void in so far as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed or apprenticed by the negligence of persons in common employment with him.⁵

Under Section 66 of the Motor Vehicles Act, 1939, any contract for the conveyance of a passenger in a stage carriage or contract carriage, in respect of which a permit has been issued under Chapter IV of the Act, shall, so far as it purports to negative or restrict the liability of any person in respect of any claim made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the

1. Section 17, *ibid.*

2. Section 14 (1), *ibid.*

3. Section 2, *ibid.*

4. Section 2, *ibid.*

5. The Employers' Liability Act, Section 3-A.

vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, will be void.

No action would lie, except in certain circumstances, for an infringement of unregistered trade mark.¹ As to the power of a registered proprietor to assign and give receipts, and assignability of registered and unregistered trade marks, Chapter V of the Trade Marks Act, 1940, contained the relevant law.² The Indian Merchandise Marks Act, 1889, and the Trade Marks Act, 1940, have been repealed and replaced by the Trade and Merchandise Marks Act, 1958.

Transfer of Government securities will not be valid unless it satisfies the provisions of the Public Debt Act, 1944.³ For a valid endorsement of a Government promissory note *see* Section 5 of the Indian Securities Act, 1920.

By Section 2 of the Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947, some of the provisions of the Defence of India Rules continue in force, subject to modifications, where any, notwithstanding the expiry of the Defence of India Act, 1939, and of the Emergency Provisions (Continuance) Ordinance, 1946. The Trading with the Enemy (Continuance of Emergency Provisions) Act, 1947, extends to the whole of India and applies also to all citizens of India outside India. For contracts with enemy firms, prohibition of trading with the enemy, control of rights, etc., in respect of trading with the enemy, transfer of property to or by enemy firms, and prohibition of trade with enemy firms and purchase of enemy currency *see* Rules 110, 98, 99, 111, 104 of the Defence of India Rules, respectively.

Any contract or agreement whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or concession accruing to him under the Minimum Wages Act, 1948, is null and void in so far as it purports to reduce the minimum rate of wages fixed under the Act.⁴

The Forward Contracts (Regulation) Act, 1952, provides for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. 'Forward contract' means a contract for the delivery of goods at a future date and which is not a ready delivery contract.⁵ 'Goods' under the Act means every kind of movable property other than actionable claims, money, and securities.⁶ For "non-transferable specific delivery contract", "option in goods", "ready delivery contract", "specific delivery contract", and "transferable specific delivery contract" *see* Section 2 of the Act.

Under Section 4 of the Prize Competitions Act, 1955, no person is allowed to promote or conduct any prize competition or competitions in which the

1. Trade Marks Act, 1940, Section 20. Now *see* Section 27 of the Trade and Merchandise Marks Act, 1958.

2. *See* Chap. V of the Trade and Merchandise Marks Act, 1958,

3. Section 3, *ibid.*

4. Section 25, *ibid.*

5. Section 2 (c), *ibid.*

6. Section 2 (d), *ibid.*

total value of the prize or prizes (whether in cash or otherwise) to be offered in any month exceeds one thousand rupees, and in every prize competition, the number of entries shall not exceed two thousand. Even where the prize offered does not exceed one thousand rupees a month the prize competitions have to be licensed.¹

The provisions of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, regulate certain conditions of service of working journalists and other persons employed in newspaper establishments. The provisions of the Act will have effect notwithstanding anything inconsistent therewith contained in any other law or in the terms of any award, agreement, or contract of service, whether made before or after the commencement of the Act, provided that the newspaper employee can enter into an agreement with an employer or avail himself of an agreement already made for granting him rights or privileges in respect of any matter which are more favourable to him than those to which he would be entitled under the Act.

Under Section 42(1) of the Merchant Shipping Act, 1958, no person shall transfer or acquire any Indian ship or any share or interest therein without the previous approval of the Central Government and any transaction effected in contravention of this provision shall be void and unenforceable. Under Section 50 of the Act, the mortgagee shall not, by reason of his mortgage of a ship or share in his favour, be deemed to be the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof. When, however, necessary, the mortgaged ship or share will be made in law available as a security for the mortgage debt.

A contract in violation of an Act is invalid.² A contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognised by the Courts, at any rate where both parties stand *in pari delicto*.³ A mortgage in violation of an Act is void.⁴ A mortgage by a person holding a certificate of administration in respect of the estate of a minor under Act XI. of 1858 of immovable property belonging to the minor without the sanction of the Civil Court previously obtained was void.⁵ A mortgage executed by a mortgagor who was at the time disqualified under Section 8 of the Jhansi Encumbered Estates Act, 1882, was void.⁶ Where the object of a sale-deed was the transfer of occupancy rights and such object was prohibited by an Act, the deed was void.⁷ No suit can be brought for the recovery of money paid under an agreement which has as its object the

1. Section 5, *ibid*.

2. *Mohammad Muzaffar Husain v. Madad Ali*, A.I.R. 1931, Oudh 309; *Jyoti Kumar v. Hari Das*, (1905) 32 Cal. 1019; *Kashi Prasad v. Kedarnoth* (F.B.), 20 All. 219.

3. *Harnosji Motabhai v. Pestanjit Dhanjibhai*, (1888) 12 Bom. 422.

4. *Makundlal v. Sunita*, A.I.R. 1931 All. 461.

5. *Chimman Singh v. Subran Kuar*, (1880) 2 All. 902.

6. *Radha Bai v. Kamod Singh*, (1908) 30 All. 38.

7. *Jhinguri v. Durga*, (1885) 7 All. 878.

evasion of the statutory prohibition against the transfer of occupancy land. Such contract is void *in toto*.¹ An agreement to pay a tax prohibited by an Act is void.² Where farming out by a municipality of its right to collect particular fees was unauthorised and *ultra vires*, the amount due to the municipality under such a contract could not be recovered.³ A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced, but if the Society pay money on the basis of such contract, it can be recovered back on the principle that the obligee at the time of taking the money made an implied contract to repay the sum.⁴ An agreement by a debtor not to raise the plea of limitation is void under Section 23 of the Contract Act as it would defeat the provisions of the Limitation Act.⁵ In *G. Rainey v. Burma Fire and Marine Insurance Co., Ltd.*, A.I.R. 1924 Rangoon 351, it has been held that a condition in a fire insurance policy that if an action is not commenced by the assured within three months after the rejection of the claim all benefit under the policy shall be forfeited is not repugnant to Section 23 and can be enforced. This decision of the Rangoon High Court does not appear tenable inasmuch as it bars the creditors from raising and utilising the law of limitation. No estoppel should be allowed against the provisions of a statute.⁶

An agreement containing obligations opposed to the policy of an Act is void.⁷ The terms of an agreement sometimes may help the Court in interpreting the policy of the law as well as the object of an Act alleged to be violated.⁸ An agreement for relinquishment in contravention of the policy of an Act is illegal and void.⁹ An agreement entered into to pay interest not awarded by a decree in addition to the sum decreed without the sanction of the Court which passed the decree was void under Section 257A of the Code of Civil Procedure, 1882, so far as it operated in satisfaction of the judgment-debt.¹⁰ Section 257A of the Code of Civil Procedure when it provided that "every agreement to give time for the satisfaction of a judgment-debt shall be void" unless made for consideration and with the sanction of the Court, etc., did not make such agreements illegal, in the sense of pro-

1. *Narsingh v. Narayan*, A.I.R. 1925 Nag. 119.
2. *Gowani Shri Purushotamji v. Jugal Das*, (1884) 8 Bom. 398.
3. *Municipal Council, Kumbakonam v. Abbahs Sahib*, (1913) 36 Mad. 113.
4. *Nabi Baksh v. Muhammadi*, A.I.R. 1929 Lah. 330; *Coltman v. Coltman*, (1882) 19 Ch. D. 64; *Ayers v. South Australian Banking Co.* (1871), 3 P.C. 548; *Turner v. Bank of Bombay*, (1901) 25 Bom. 52; 2 Bom. L.R. 803; *Rankin v. Emigh*, 218 U.S. 27 (1910); *Mathura Mohan v. Ramkumar*, 43 Cal. 790; 23 C.L.J. 26; 35 I.C. 305; 20 C.W.N. 370.
5. *Ramamurthy v. Gopayya*, (1917) 40 Mad. 701.
6. *Hirabhai v. Manufacturers' Life Insurance Co.*, (1912) 14 Bom. L.R. 741.
7. *Sis Ram v. Asghar Ali*, (1913) 35 All. 19; *Naoraji Nusserwanji v. Kazi Sidick Mirza*, (1896) 20 Bom. 636.
8. *Karson v. Gattu*, (1913) 37 Bom. 320.
9. *Moti Chand v. Ikram-Ullah*, (1917) 39 All. 173 P.C.
10. *Davlatasing v. Pandu*, (1885) 9 Bom. 176.

hibited by law. It only prevented such agreements being enforced in a Court of law. Where such an agreement entered into by the parties but never sanctioned by the Court as required by Section 257A, formed part of the consideration for a bond, and had actually been enjoyed by the obligee of the bond, it was held that such consideration, not being in its nature illegal, and not having as a fact failed, there was no reason why the obligor should not enforce the terms of the bond.¹ An alienation made pending a temporary injunction under Section 492 of the Code of Civil Procedure was not void under Section 23 of the Contract Act.²

There is nothing in Sections 23 and 24 of the Indian Contract Act to support the opinion that a sale, made with the view of defeating a probable execution, is a sale with a fraudulent and unlawful object, and, therefore void within the meaning of those Sections. A creditor without a specific lien (e.g., a mortgage or other direct charge or incumbrance) has not any *a priori* right to debar his debtor from parting with his immovable property until it is attached in due course of law.³

Where an Act or the Rules made thereunder are not framed solely for the protection of the revenue, but are ones embracing other important objects of public policy as well, an agreement violating the policy of such Act will be void.⁴ An agreement inconsistent with the policy of the Insolvency Act was unlawful under Section 23 of the Contract Act.⁵ Contracts entered into in violation of the Excise Acts are void on the ground of public policy.⁶ Excise contracts fashioned in contravention of the Excise Acts are against public policy and therefore void.⁷

A partnership formed in violation of the policy of the Madras Abkari Act, 1886, is illegal. A pronote executed for advances to be made for such partnership as the consideration is void. Where a partnership already exists and it does not violate the Abkari rules, it will not be illegal.⁸ Without obtaining the sanction of the Commissioner, A agreed to transfer in consideration of a certain amount his licence for a foreign liquor tavern in favour of B who was to do the business from the date of the agreement. The agreement being in contravention of the Cochin Abkari Act, 1077 M.E., was void,

1. *Bank of Bengal v. Vyabhoj Gangji*, (1892) 16 Bom. 618.

2. *Manohar Das v. Ram Aulan*, (1903) 25 All. 431; *Delhi and London Bank, Ltd. v. Ram Narain*, (1887) 9 All. 497 followed.

3. *Rajan Harji v. Ardesht Hormusji*, (1880) 4 Bom. 70, 71; *Pullen Chetty v. Ramalinga Chetty*, (1869-70) 5 M.I.C. 368 (reprinted, 1898).

4. *Boistub Churn v. Wooma Churn*, (1889) 16 Cal. 436; *Marudamuthu v. Rangasami*, (1901) 24 Mad. 401.

5. *In the matter of V. Purushotamdoss and Bros.*, A.I.R. 1929 Mad. 385.

6. *Kamayya v. Venugopal* (F. B.), 9 Ain-e-Dccan 530; *Fukirchand v. Bansilal* (F. B.), A.I.R. 1955 Hyd. 28; *Nalain Padmanabham v. Sait Badrinath*, (1912) 35 Mad. 582.

7. *Babiah v. Subhan* (F. B.), A.I.R. 1954, Hyd. 156.

8. *Ramanayudu v. Seetaramayya* (F. B.), A.I.R. 1935 Mad. 440; *Satyala v. Bhogavalli*, A.I.R. 1935 Mad. 895; *Vazhamuni v. Nathumuni*, A.I.R. 1930 Mad. 361; 122 I. C. 342; *Nalain Padmanabham v. Sait Badrinath*, 35 Mad. 582; 10 I.C. 126 followed.

and A could not claim the money due under the agreement.¹ Where a licensee under the Opium Act, 1878, entered into an agreement with a third person (non-licensee) to share the profits and losses of his business in consideration of the latter's contributing towards the capital of the business, the agreement was adjudged neither illegal nor opposed to public policy nor in contravention of any of the rules framed by the Punjab Government under the Opium Act. Such an agreement did not involve a "transfer" or "sub-lease" of the licence.² The statute law of India forbids transfers of expectancies, and it would be futile to forbid such transfers, if contracts to transfer them are to be enforced as soon as the estate falls into possession.³ Covenants offending against principle underlying the rule of perpetuities are void.⁴ Where by virtue of Section 7(1)(a) and Section 7(2) of the U. P. Control of Rent and Eviction Act, landlord could not create a tenancy without the permission of the District Magistrate, the defendant could not avail himself of such a tenancy created without the necessary permission.⁵ A contract of sale by an occupancy tenant or a non-occupancy tenant without the consent of the landlord not being void *ab initio* under the Assam (Temporarily Settled Districts) Tenancy Act, 1935, a contract of recovery was enforceable.⁶ When an agreement was made in contravention of the mandatory provisions of Section 29 of the Chittagong Port Act, 1914, it was not enforceable.⁷

Failure duly to stamp a document embodying a contract does not affect the validity of the contract but affects only the admissibility of the document in question in evidence.⁸ See author's *Indian Stamp Act, 1899*, 2nd/ed., 102.

The Santhal Pargannas Regulations, 1872, provided that compound interest would not be decreed by any Court. The law did not lay down that an agreement between any two persons living in the Santhal Pargannas to pay compound interest upon the amount borrowed was unlawful within the meaning of Section 23 of the Contract Act.⁹

In *Palaniappa v. Arunasalam*, [1962] 2 W.L.R. 548 P.C. : [1962] 1 Añ E.R. 494 P.C. (a case from Malaya), the respondent who owned 139 acres of land cultivated with rubber in Malaya, in order to avoid the Rubber Regulations of 1934, under which the permissible production of holdings of rubber land of more than 100 acres was assessed by the local district officer, transferred 40 acres of the land to his son, the appellant, for a purported consideration

1. *Krishna v. Narayana* (F. B.), A.I.R. 1962 Ker. 21.

2. *Shiv Dayal v. Bishan Dass*, A.I.R. 1961 Punj. 405.

3. *Jagannada v. Prasad Rao*, (1916) 39 Mad. 554.

4. *Dinkarrao Ganpatrao v. Narain Vishwanath*, (1923) 47 Bom. 191; *Gopi Ram v. Jeot Ram*, (1923) 45 All. 478.

5. *Lakshmi Chand v. Niader Mal*, A.I.R. 1961 All. 295.

6. *Bipin v. Masrab*, A.I.R. 1961 Ass. 173.

7. *Md. Ibrahim v. Chittagong Port Commissioners*, (1927) 54 Cal. 189.

8. *Joyma Bewa v. Easin Sarkar*, (1926) 53 Cal. 515; *Gulzarilal v. Ramgopal*, A.I.R. 1937 Cal. 765.

9. *Shama Charan v. Chuni Lal*, (1899) 26 Cal. 238.

which was not in fact paid. The transfer was duly registered and a certificate of title issued to the son. Thereafter the father, having agreed to sell the 40 acres to a third party, asked his son to execute a power of attorney so as to enable him to transfer the land to the prospective purchaser. The son having refused to do so, the father brought proceedings claiming that the son was a trustee of the 40 acres holding them in trust for him. *Hold*, that the father was not entitled to a retransfer of the land from the son. He had of necessity to disclose in the proceedings that he had practised a deceit on the public administration of which act the Courts were bound to take notice even though the son had not pleaded it¹ and he could not use the process of the Courts to get the best of both worlds—to achieve his fraudulent purpose and also to get his property back. Since the father had of necessity to disclose his own illegality, *viz.*, his deceit of the public administration of the country, in order to make out his claim (e.g., to rebut the presumption of advancement), the Court was bound to take notice of the illegality, would not lend its aid to the father, and would let the legal estate lie where it was, there being no *locus poenitentiae*, as the fraudulent purpose had already been effected. Both claim and counterclaim would be dismissed.²

By Section 5 of the Rubber Supervision Enactment, 1937, of Malaya : “(i). . . .no person shall purchase . . . rubber . . . unless he shall have been duly licensed in that behalf under this Enactment. (ii) Every licence shall be in the prescribed form . . .” Section 16 provides : “(ii) No licence shall be assignable” and (iii) A licence is personal . . .” In *Chai San Yin v. Liew Kwee Sam*, [1962] 2 W.L.R. 765 P.C., the purchase was by a partnership. The licence was personal and not assignable, and the names of the partners not having been included in the licence as required by the said Enactment the purchase was prohibited by law, a prohibition made in the public interest, which would be enforced notwithstanding that the appellant had to rely on his own illegality, and, accordingly, the respondent could not recover the price. The dictum of Scrutton, L.J., in *In re Mahmoud and Ispahani*, [1921] 2 K.B. 716 at 729 : 37 T.L.R. 489 C.A., that “the Court must enforce the prohibition even though the person breaking the law relies upon his own illegality”, was applied.

In *Udhoo Dass v. Prem Prakash*, A.I.R. 1964 All. 1, a Full Bench decision, it was held that an order made under Section 7(2) of U.P. (Temporary) Control of Rent and Eviction Act, 1947, was not law. Hence a contract of tenancy of an accommodation governed by the U.P. (Temporary) Control of Rent and Eviction Act entered into by a landlord with a person on payment of rent by the latter, for the purpose of carrying on business in the accommodation, in violation of a general or special order issued by the District Magistrate concerned under Section 7(2) of the Act is not void under Section 10 read with Section 23 of the Contract Act. *Shyam Sunder v. Lakshmi Narain* (Lucknow Bench), A.I.R. 1961 All. 347, was overruled.

1. *Scott v. Brown, Doering, McNab and Co.*, [1892] 2 Q. B. 724 ; 28 T.L.R. 755 C.A.

2. *Chettiar v. Chettiar*, [1962] 1 All F.R. 494 P.C. : [1962] 2 W.L.R. 548 P.C.

Defeating provisions of law.—When the consideration or object of an agreement is of such a nature that if permitted, it would defeat the provisions of any law, whether constitutional, statutory, common, or personal,¹ the consideration or object is unlawful, and an agreement with such consideration or object is void, that is, unenforceable.² It is not permissible to any person to rely upon a contract the making of which the law prohibits.³ *A*'s estate is sold for arrears of revenue under the provisions of an Act of Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

Where the terms of a lease of tolls from Government prohibit an assignment except with the previous permission of the Collector and empower the Collector to revoke the lease or impose penalty against breach of the terms of the lease, an agreement to assign the lease without the aforesaid permission would offend against the covenant in the lease and not against the provisions of the law as contemplated by Section 23 of the Contract Act.⁴

A partnership formed solely with a view to taking toll contracts at a public auction is in itself not illegal. The principle of public policy cannot be made to apply in its result to a combination of persons who agree not to bid against one another at a public sale held for farming out public revenues. The combination is not rendered illegal merely because Government is a party to the sale or that the proceeds of the sale would be credited to public revenues or that it might result in a possible loss to the Government. Nor can the combination be regarded as other than innocent merely because it discouraged competition amongst the partners themselves.⁵

It will be submitted that where a partnership or assignment involves the violation of a term of a lease or assignment, it will not be hit by Section 23 as being illegal *qua* such violation. Where however the partnership or assignment violates the provisions of an Act or the policy of the law it will be held void. It is the general policy of the law, and not the terms of a lease, assignment, or licence, that will be decisive. The Government as a party makes no difference.

1. *Kunhi Avulla v. Kunhi Avulla*, A.I.R. 1964 Ker. 200 (Mahomedan law).

2. *Suwalal v. Clive Mills Co.*, A.I.R. 1960 Cal. 90.

3. *Waman v. Ratilal*, A.I.R. 1959 S.C. 689.

4. *Bhagwant Genuji v. Gangabisan Ramgopal*, A.I.R. 1940 Bom. 369; *Bhikanbhai v. Hirallal*, (1900) 24 Bom. 622; 2 Bom. L.R. 483; *Gangadhar v. Damodar*, (1897) 21 Bom. 522; *Venkatanandam v. Dhanaraju*, 117 I.C. 298; A.I.R. 1929 Mad. 639; *Karsan v. Gatlu Sivaji*, 37 Bom. 320; 19 I.C. 442; 15 Bom. L.R. 227; *Nazaralli Sayad Imam v. Babamiya*, 40 Bom. 64; 17 Bom. L.R. 701; 30 I.C. 913; A.I.R. 1915 Bom. 244; *Radhey Shiam v. Mewa Lal*, 51 All. 506; 116 I.C. 89; A.I.R. 1929 All. 210; 1929 A.L.J. 212.

5. *Doorga Singh v. Sheo Pershad*, 16 Cal. 194; *Hari Balkrishna v. Naro Moreswar*, 18 Bom. 342; *Md. Mira Ravuthar v. Savvasi Vijaya*, 23 Mad. 227; 27 I.A. 17; 10 M.L.J. 1; *Bhagwant Genuji v. Gangabisan*, A.I.R. 1940 Bom. 369.

There is no prohibition against the formation of a partnership in regard to the business conducted under a licence granted under the Central Excises and Salt Act, 1944. There is no illegality vitiating the partnership and a suit for settlement of accounts of the partnership by the new partner against the original licensee is maintainable.¹

It appears that *Govindaraj v. Kandaswami*,² for which see below, lays down a more reasonable proposition of law than *Chandaji Sukhraj & Co. v. Lal & Co.*³ The general policy of the law will be decisive as to the unlawfulness of a transaction entered into by a third person with the lessee, licensee, assignee, or permit-holder. The policy of the law will determine the public policy of the law. The Government as a party to the lease, assignment, licence, permit, or quota granted will make no difference.

To show that a partnership is illegal it is necessary to prove either that the object of the partnership is one the attainment of which is contrary to law or that the object being legal, its attainment is sought in a manner which the law forbids. The plaintiffs entered into a partnership with one *K* to carry on the business of agency which *K* had from the Government for the purchase of grain. The agreement between the Government and *K* was that the agent will not assign, sublet, or transfer in any manner whatsoever the whole or any part of his interest in the agreement. It was held that a mere infringement of a term of the Government in the agreement against subletting or transfer did not render the transaction illegal.⁴

Under the Foodgrains Control Order a person could not engage himself in an undertaking involving the purchase, sale, or storage for sale of foodgrains except under a licence and the contravention of the prohibition was made punishable under both the Defence of India Rules and Clause 7-A of the said Foodgrains Control Order. A partnership though lawful in its inception became unlawful when it actually conducted the entire business in contravention of the said Order. That being so, no suit would lie for dissolution or for settlement of accounts of that partnership.⁵

It cannot be laid down as a broad proposition that a contract to do what is punished in order to safeguard revenue is never void. It is always a question of construction whether the punishment is intended by the Legislature to make the act expensive or to prohibit it, and where the conclusion is reached that the intention is to prohibit the act, the contract to do it would be void. A working test for finding whether the intention be to prohibit is to ascertain whether the punishment is repeated at each act and where that is done the act would be treated as forbidden. Applying the test to Section

1. *Chandaji Sukhraj & Co. v. Lal & Co.*, A.I.R. 1960 Andhra 444; *Gopala Krishnayya v. Hanumayya*, S.A. No. 675 of 1952 (Andhra) relied on; *Govindaraj v. Kandaswami*, (1957) Mad. 1245; A.I.R. 1957 Mad. 186 dissented from, for which see below.

2. (1957) Mad. 1245; A.I.R. 1957 Mad. 186.

3. A.I.R. 1960 Andhra 444.

4. *Manbharibai v. Bajrang Rice Mill*, A.I.R. 1956 Nag. 225.

5. *Narayanam & Bro. v. Subbaraju*, A.I.R. 1957 Andhra 837.

6 of the Cochin Tobacco Act, it is clear that a person is punished for each act contrary to the provisions of the Act or rule. The act is forbidden and the contract to do so is void.¹

Where a penalty is imposed by statute upon any person who does a particular act, it may not imply a prohibition of that act. The question depends on whether the contract in dispute is or is not forbidden. The crucial test is whether or not the partners would be guilty of an offence under the Excise Act if they had carried on the business in partnership with the licensee. If the answer is in the affirmative it establishes the illegality of the partnership.²

An agreement of partnership which will entail a transfer of a licence or permit granted by the Government when there is an express provision prohibiting such a transfer is illegal and void *ab initio*.³

The arrangement for the purchase of *toddy* shops in the name of *A benami* for *B* is in contravention of the Madras Abkari Act, 1886. Under the said Act a licence cannot be held by one person to whom it is granted for another who is unknown to the licensing authority. *B* managing the shop for which the licence is held by *A* renders himself liable under Section 55 of the Madras Abkari Act, 1886. Such an agreement being inherently illegal and opposed to the public policy and the parties being *in pari delicto*, the Court can render no assistance in enforcing it. Hence *B* is not entitled in any case to recover under Section 65 of the Contract Act the money paid to *A* by him for the purchase of the shops.⁴

A partnership entered into for the purpose of conducting a business in *arrack* or *toddy* on a licence granted or to be granted to only one of the partners is void *ab initio*, whether the contract was entered into before the licence was granted or afterwards, in that it involves a transfer of the licence, which is prohibited under Rule 27 and punishable under Section 56 or a breach of Section 15 of the Madras Abkari Act, 1886, punishable under Section 55 because the unlicensed partner, by himself or through his agent, the other partner, sells without a licence. If a partnership is lawful at its inception, because it is not intended to infringe any provision of the Contract Act, it nevertheless becomes unlawful when it intends to conduct the business jointly on a licence granted to only one of the partners. Hence a partner in a partnership entered into for the purpose of vending *arrack* cannot file a suit for the balance due on settlement of accounts when only one of the partners

1. *Commissioner of Income-Tax v. Union Tobacco Co.*, A.I.R. 1960 Kerala 276; *Victorian Daylesford Syndicate Ltd. v. Dott*, [1905] 2 Ch. 624, 630; *Champsey Dossa v. Gordhandas Kessowji*, 40 I.C. 805; A.I.R. 1917 Bom. 250; on appeal, *Gordhandas Kessowji v. Champsey Dossa*, A.I.R. 1921 P.C. 137; *Venkatanandam v. Dhanaraju*, A.I.R. 1929 Mad. 689; *Bhikanbhai v. Ramdinshet*, A.I.R. 1929 Mad. 689.

2. *Govindaraj v. Kandaswami*, A.I.R. 1957 Mad. 186; *Velu Padayachi v. Sivasooriam* (F.B.), A.I.R. 1950 Mad. 444, followed.

3. *Hiria Gowder v. Naga Maistry*, A.I.R. 1957 Mad. 620.

4. *Venkata Subbayya v. Attar Sheik*, A.I.R. 1949 Mad. 252; *Chennayya v. Janikamma*, (1944) 1 M.L.J. 434; A.I.R. 1944 Mad. 415; *Italia v. Cowasjee*, (1944) 1 M.L.J. 97; A.I.R. 1944 Mad. 295; *Padmanabham v. Badrinatha*, 35 Mad. 582; 10 I.C. 126.

has obtained a licence under the Madras Abkari Act for the vending of arrack.¹

When there is a definite provision of law forbidding sale, transfer, or subletting of a licence, and a party claims a right for such subletting or transfer as has taken place, the Court should refuse to enforce such contract as the consideration or object of such an agreement was definitely forbidden by law. A person who is not the holder of the licence, where under the statutory provisions licence is to be taken before the article in question can be sold by him, he is not entitled to get a decree from the Court for the value of the articles supplied.²

The prevention of the sale of intoxicating liquor on credit has a social or moral purpose and hence any contract made in contravention of any such prohibition falls within Section 23 of the Contract Act. It makes no difference that the prohibition is contained in a statutory rule and not in the statute itself,³ though the penal provisions of a statutory rule are construed strictly.⁴

A partnership entered into between the licensee and his partners in contravention of the statutory prohibitions being illegal and unenforceable, a suit for accounts by the other partners against the licensee is not maintainable.⁵

A term of the licence for running a talkie that it should not be assigned or transferred or sub-let will be violated if the licensee enters into partnership with reference to the subject-matter of the licence. Such a partnership will be illegal and void on the ground of public policy.⁶ As it has been submitted earlier, it appears that the Court should declare a contract between a citizen and citizen void only when it is opposed to the policy of the law of the country and not *qua* its opposition to the terms of a lease, permit, assignment, licence, or quota granted by the Government to one of the partners. A violation of a term in the lease, licence, permit, quota, or assignment should result in cancellation of the power or in damages in favour of the granting authority. A violation of a term of the assignment or licence on the part of the assignee or licensee should not be allowed by the Court to enable him to perpetrate a fraud on the partner or partners induced to contract with him. When the contract of partnership is opposed to the policy of the law of the country the Court should invoke the doctrine of the public policy of the law to the detriment of the third person working as a partner with the lessee, assignee, licensee, permit-or quota-holder.

1. *Velu Padayachi v. Sivasooriam* (F.B.), (1950) Mad. 987 : A.I.R. 1950 Mad. 444.

2. *Mafizuddin v. Habibuddin*, A.I.R. 1957 Cal. 336 ; *Boistub Churn v. Wooma Churn*, (1889) 16 Cal. 436.

3. *Sugonmal v. Moosa Issa*, A.I.R. 1943 Sind 219 ; *Dewandas v. Kesomal*, 87 I.C. 353 : A.I.R. 1925 Sind 55 : 18 S.L.R. 16.

4. *Nagappa v. Veeyares & Co.*, A.I.R. 1953 Mad. 296.

5. *Rama Rao v. Papayya*, A.I.R. 1954 Andhra 51.

6. *Viswanathan v. Namakchand*, (1954) Mad. 1013 : A.I.R. 1955 Mad. 536 ; *Velu Padayachi v. Sivasooriam* (F.B.), (1950) Mad. 987 : A.I.R. 1950 Mad. 444.

A contract of partnership to trade in feathers whose export is prohibited is void being against public policy.¹

A licensee of salt manufacture cannot be said to contravene the terms of his licence whereby he is prohibited from alienating the interest, simply because he admits members of his family and others as partners, who however do not actually take part in the manufacture, nor is there any document directly transferring the right of manufacture to such partners.²

Where the real object and the necessary effect of the sub-lease was to enable the plaintiff to manufacture salt without a license in the guise of a sub-lease although that was forbidden by law and by the terms of the license, the sub-lease was illegal.³

An agreement which contravenes the policy of the Excise Act and which has for its object the carrying on of a business in contravention of the excise law is illegal.⁴

Where an agreement is entered into between a licensee and a third person in consideration of money contributed by the latter for sharing the profits and losses in the business, the transaction does not amount to a transfer or sub-lease of the liquor contract contravening the provisions of Rule 82 under U.P. Excise Act, 1910, Sections 40 and 41, or of Section 23 of the Contract Act.⁵

The sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of Section 23 of the Contract Act, and any claim to recover money due on such sub-lease is not enforceable in a court of justice.⁶

The mere fact that the State had for administrative purposes imposed a condition that its contractors should not take co-sharers or *shikmi* contractors, did not render the agreement unlawful so as to be void under Section 23 of the Contract Act, no specific penalty having been attached by the State to the transaction in question.⁷ There is no bar against compensation being paid for services rendered in spite of the provision against sub-contract.⁸

An agreement to sub-let will not be illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty by conditions in the lease to the plaintiff. The penal consequences of the breach may be limited in a given case to the specific penalty

1. *Fazal v. Ata*, A.I.R. 1929 Lah. 663.

2. *Gordhandas Kessowji v. Champsey Dossa*, A.I.R. 1921 P.C. 137.

3. *Ismalji v. Raghunath*, (1909) 33 Bom. 636.

4. *Behari Lal v. Jagodish*, (1904) 31 Cal. 798; *Gopalrav v. Kallappa*, (1901), 3 Bom. L.R. 164.

5. *Radhey Shyam v. Mewa Lal*, A.I.R. 1929 All. 210; *Shiam Behari v. Malhi*, (1916) 39 All. 107; 38 I.C. 178; 14 A.L.J. 1035; *Bisheshar Das v. Govind Ram*, (1906) Punj. Rec. 114.

6. *Debi Prasad v. Rup Ram*, (1888) 10 All. 577.

7. *Abdullah v. Allah Diya*, (1927) 8 Lah. 310; *Abdulla v. Mammod*, (1903) 26 Mad. 156.

8. *Gangadhar v. Damodar*, (1897) 21 Bom. 522.

and may not make the contract void.¹

Where, by the terms of a lease of a ferry, the renter should not transfer or sub-rent the ferry, but such transfer or sub-lease is not prohibited by statute, or by a rule framed under a statute, a transfer of it will be valid as between the renter and his transferee, though it may be invalid as against Government.²

M took lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without the leave or license of the Magistrate. M subsequently admitted B as his partner to share with him equally in the profits to be derived from the lease. It was held that the partnership was not void by reason of the covenant not to underlet or assign the lease.³

An agreement to share profits which would contravene the terms of the licence as between Forest Officer and the licensee is not forbidden by law, nor would it defeat the provisions of any law.⁴

Where under the Forest Act, a person obtained from the Government a contract in his own name and forms a partnership to carry out the terms of the contract, the partnership is not illegal under Section 23 of the Contract Act.⁵

Where an assignment of a forest contract was not absolutely prohibited under the Forest Rules it would not be void when made. Where an assignment was permissible with the previous sanction in writing of the appropriate officer, and one was made without the necessary permission, such an assignment though not binding on the forest authorities binds the third person, the contract not being invalid under Section 23 of the Contract Act.⁶

When a settlement contract is made, reselling the goods back again from the original buyer, the intention is not that after the settlement contract the first contract should be gone. The intention is that the two contracts should stand together so that there can be a set off as regards delivery and a set off as regards price, for everything except the price. If the original contract is hit by statutory prohibition, the settlement contract even when containing an arbitration clause cannot be sustained.⁷ If interest in excess of the statutory rate is stipulated under a contract, such excess interest cannot be recovered.⁸

A contract the object of which is to evade some statutory provisions is

1. *Bhikanbhai v. Hirralal*, (1900) 24 Bom. 622.

2. *Abdulla v. Mammod*, (1903) 26 Mad. 156.

3. *Gauri Shankar v. Mumtaz Ali* (F.B.), (1880) 2 All. 411.

4. *Nazaralli v. Babaniya*, (1916) 40 Bom. 64.

5. *Venkatanandam v. Dhanaraju*, A.I.R. 1929 Mad. 689; *Abdullah v. Allah Diya*, 8 Lah. 310; A.I.R. 1927 Lah. 333, and *Gauri Shankar v. Mumtaz Ali Khan* (F.B.), (1880) 2 All. 411 followed.

6. *Harkaran v. Champalal*, A.I.R. 1962 M.P. 22.

7. *Bhudarmull v. Uma Shankar*, A.I.R. 1953 Cal. 618; *Uttam Chand v. Jawa Mamooji*, 46 Cal. 534; A.I.R. 1920 Cal. 143.

8. *Muthuswami v. Savarimuthu* (F.B.), A.I.R. 1963 Mad. 249, 251.

illegal and unenforceable. Damages for the breach of such an illegal contract cannot form consideration for promise to pay them by another contract. The latter contract is also illegal and unenforceable.¹

A consent decree was passed with a term that plaintiff may recover the amount from the salary of the defendant at Rs. 2 per month by attachment. The defendant was a railway servant. It was held that the exemption under Section 60 of the Code of Civil Procedure was mandatory and could not be waived. The defendant whose salary was exempt from attachment under Section 60 (1), proviso (i), of the Code of Civil Procedure could not contract himself out of the statutory provision. The contract was opposed to public policy and was void under Section 6 (f) of the Transfer of Property Act as well as under Section 23 of the Contract Act.² The principle of waiver does not apply to the statutory prohibition based on public policy.

An agreement to allow another person to occupy a house and pay compensation for use and occupation is not prohibited by law. Such a contract is permissible and cannot be said to be illegal or void on the ground that it defeats the provisions of Section 107 of the Transfer of Property Act.³

Where an agreement was prohibited by law and declared an offence punishable under Rule 90-C(3) of the Defence of India Rules it was illegal and could not be enforced in view of Section 23 of the Contract Act. Where the contract was illegal at its inception it could not become valid after the expiry of the notification which made it illegal.⁴ Where there were Government proclamations prohibiting trading with the enemy, and goods were shipped in enemy port, the performance of the contract became illegal.⁵

An instalment bond provided that in case of default in payment of any instalment the creditor was to have the right to realise the entire amount under the bond with interest at certain rate or only the amount in respect of instalment in payment of which default was committed. It was further stipulated that the creditor was to have the right to realise by filing a suit in Court the total amount due from the executant on account of the principal and interest after the expiry of time for all the instalments, that is, at the time when the last instalment was due. No instalment was ever paid at any time by the executant so the first default in payment occurred in June, 1934. The creditor instituted the suit on 22 July, 1944. As the entire amount under the bond was realisable, it was held, on default in payment of an instalment, the whole amount became due when the first default was committed and therefore time began to run under Article 75 from the date of the first default, that is, June, 1934, no matter whether the creditor had been given the option of suing only for the instalment in respect of which a default had

1. *Sadasivayya v. Narayana & Co.*, A.I.R. 1953 Mad. 845.

2. *M. & S. M. Rly. v. Rupchand*, A.I.R. 1950 Bom. 155; *Post-Master General v. Chenmal Mayachand*, A.I.R. 1941 Bom. 389; 43 Bom. L.R. 758.

3. *Dau Dayal v. Brij Mohan*, A.I.R. 1952 All. 344.

4. *Kishan Lal v. Bhanwar Lal*, A.I.R. 1952 Raj. 81.

5. *Nissim Isaac Bekhkor v. Sultanali Shastary & Co.*, (1916) 40 Bom. 11.

been committed. The third option given to the creditor to sue for the entire amount at the time when the last instalment became due could not arrest the running of time when once it had begun to run under Article 75. Such a stipulation was, it was held, nothing short of a contract or agreement between the parties for altering the statutory period of limitation, namely, three years as prescribed under Article 75 of the Limitation Act, 1908, and must therefore be deemed to be void under Section 23 of the Contract Act. The suit was therefore barred by limitation under Article 75.¹

Under a contract of carriage the plaintiffs conveyed a cargo of bulk wheat from America to England in their ship which, when bunkered with fuel sufficient for the voyage, submerged the load line contrary to the provisions of the (English) Merchant Shipping (Safety and Load Line Conventions) Act, 1932, Sections 44 and 57. The defendants, who were indorsees of bills of lading in respect of part of the cargo, paid part of the freight for their share of the cargo but, in view of the overloading, withheld £2,000 of the total freight contracted to be paid by them. On a claim by the plaintiffs for the balance of the freight the defendants contended that the contract was unenforceable by the plaintiffs by reason of illegality, *viz.*, the overloading. The plaintiffs were held entitled to the balance of the freight for the following among other reasons:

(i) the loading of the ship so as to submerge the load line was an infringement of law that was not contemplated by the contract, and, on the true construction of the Act of 1932 the contract for the carriage of goods in the ship was not within the ambit of the prohibition against overloading enacted by the statute, which accordingly did not render the contract unenforceable for illegality,² and

(ii) the plaintiffs did not need to prove the illegal act, *viz.*, the overloading, in order to recover the freight, as it was enough to prove that the goods were delivered safely, and

(iii) the plaintiffs were not barred from recovering the freight by the fact that the overloading was a crime, as the right to the freight was not brought into existence by the crime, which affected only the total amount of freight earned, and no part of the claim for freight could be identified clearly as being the excess illegally earned.³

Section 23 does not apply to the case of a contract entered into by the Managing Director of a public company with another company in which the said Director has interest. There is no statute prohibiting contracts between two companies, one private and another public, with some common shareholders and common directors.⁴

1. *Bhagwati Prasad v. Chatrapal*, A.I.R. 1947 All. 38. Now see the Limitation Act, 1963, Article 37.

2. *Wetherell v. Jones* (1832), 3 B. & Ad. 225.

3. *St. John Shipping Corporation v. Joseph Rank, Ltd.*, [1956] 3 All E.R. 683; *Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R. 602, distinguished.

4. *Albert v. Rampada*, A.I.R. 1959 Cal. 715.

Before Section 23 can apply there must be an agreement. Section 23 has no application to rules such as Rule 143 of the Railway Establishment Code, containing a provision for service agreement. A service agreement under Rule 143 of the said Code is not in conflict with the provisions of Section 23 of the Contract Act.¹

Under the Chartered Accountants Act, charging of fees on a percentage basis is specifically included among the condemned varieties of misconduct and is in law prohibited and is therefore hit by Section 23 of the Contract Act.²

The occasional departures from rules is no answer to an objection as to the competency of an officer to make commitments on behalf of the Government. Where contracts are not executed by the persons as are authorised so to do and a mandatory rule is thus violated, the contracts will be void in law and not binding on the Government.³

The idea of illegality is different from the idea of excess of authority.⁴ There is no material difference between the expressions 'in the form' and 'in accordance with the form'. Where a statute requires an agreement to be 'in the form' or 'in accordance with the form' prescribed by it, then unless the contrary is clearly expressed, it is a sufficient compliance with the statute if the agreement is substantially in the form; any inconsequential variation is immaterial.⁵

According to Buddhist law, a *rahan* is forbidden by his personal law, that is, the *Vinaya*, to engage in trade.⁶ As noted before, "any law" in clause 2 of Section 23 means statutory, constitutional, common, or personal law of the citizens. The sale of pork or wine was prohibited under the Mahomedan law.⁷ Whitley Stokes thought that Section 23 of the Contract Act repealed the Mahomedan law as regards the agreements which were not forbidden by law, that is, legislative enactment. For the sake of logic, however, the said view of Whitley Stokes does not appear tenable, because clause 2 of Section 23 seems to have saved from the liberality of clause 1 the agreements which if permitted would defeat the provisions of the personal law of the defendant. The bar of the personal law curtails the freedom which might be inferred in the absence of a statutory provision prohibiting a given transaction. In the circumstances, it may be submitted that the public policy of the law will be decisive in the matter in these days. The principle of *quantum meruit* will also apply.⁸

In *Dayal Singh v. Des Raj*, A.I.R. 1964 Punjab 72, more than 20 persons

1. *Priya Gupta v. General Manager, North Eastern Ry.*, A.I.R. 1959 All. 643.

2. *Basu v. Mukherji*, A.I.R. 1957 Cal. 449.

3. *Purkayastha v. Union of India*, A.I.R. 1955 Assam 33.

4. *Radhasoami v. Hanskumar*, A.I.R. 1959 M.P. 172.

5. *Banarsi Das v. Cane Commissioner*, A.I.R. 1956 All. 725.

6. *A.R.L.P. Firm v. U. Po. Kyaing (F.B.)*, A.I.R. 1939, Rangoon 305.

7. Charles Hamilton: *Hidaya*, London, 1791, vol. II, 299-300, 429; vol. IV 114, 118.

8. Whitley Stokes: *Anglo-Indian Codes*, vol. I (1887), 496, Introduction.

engaged in a business formed an association to apply to the Controller to get a quota of steel and the activity was a continuous activity and the association after it got the quota distributed the same to the members. The association was not registered as a company as required by the Companies Act. The association was illegal. A suit by some of the members for accounts against the office bearers and the other members of the association was not maintainable. In *Ajodhya v. Narain*, A.I.R. 1963 Patna 326, supply was made in contravention of the Iron and Steel (Control of Production and Distribution) Order, 1941. The price could not be recovered. In *Basavayya v. Kotayya*, A.I.R. 1964 Andhra 145, the dealer entered into a partnership with another in contravention of the Madras Cloth (Dealers) Control Order, 1944. A suit by him for the dissolution of the partnership and settlement of accounts was not maintainable.

Fraudulent.—When the consideration or object of an agreement has been fraudulent, the consideration or object is unlawful. An agreement of which the consideration or object is thus unlawful is void, that is, unenforceable. *A, B and C* enter into an agreement for the division among them of gains acquired or to be acquired by them by fraud. The agreement is void as its object is unlawful. Money paid in pursuance of a contract intended to be a fraud on the payee cannot be recovered. The fact that the payee discovers the fraud and refuses to perform the contract is immaterial.¹

A clause in a fire insurance contract that in no case whatever the company should be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration does not operate so as to defeat the provisions of the law of limitation and does not therefore render the contract void.²

Where two persons enter into an agreement not to raise the bids in revenue sales but to divide between themselves the property purchased, the effect of which is to prevent the land from being sold for its real value, such agreement is void as its object is fraudulent and unlawful.

Where an agreement is merely an honest combination between two bidders to purchase the property at an advantageous price and does not go further by resorting to a secret artifice for the purpose of defrauding a third person it is not void as being against public policy as its object is not fraudulent or unlawful.³

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval.

Where there is an acceptance on behalf of the principal of an offer which

1. *Berg Sadler & Moore*, [1937] 2 K.B. 158; *Alexander v. Rayson*, [1936] 1 K.B. 169; *Harry Parker, Ltd. v. Mason*, [1940] 2 K.B. 590.

2. *Dawood Tar Mahomed Bros. v. Queensland Insurance Co.*, A.I.R. 1949 Cal. 390; *A. N. Ghosh v. Reliance Insurance Co.*, 11 Rang. 475; A.I.R. 1934 Rang. 15.

3. *Huthegowda v. Basaviah*, A.I.R. 1954 Mysore 29; *Ramlal v. Rajendra*, 8 Luck. 233; A.I.R. 1933 Oudh 124.

has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied.

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract.¹

Between 1953 and 1955 a husband, who was a British subject resident in South America, acquired shares in American companies in the sole name of his wife, who was an American citizen, the intention being that the shares should belong beneficially to them equally. The reason why the shares were solely in the wife's name was to evade a Federal-tax, which would have been payable if the interest of the husband, a non-resident alien, had appeared. Differences arose between the husband and the wife, and she sold the investments and retained the proceeds. The husband now claimed one half of the proceeds. The husband's claim failed because though the intention, when the shares in companies were acquired, was that they should belong equally to the husband and the wife, yet the presumption of advancement arise and, as the reason for the shares being solely in the wife's name was the desire to evade deduction of tax, the husband would have been unable to rebut the presumption if the tax had been United Kingdom tax, because he would not have been able to set up his own illegality in support of a claim for equitable relief.² Further, the Court would not give its aid to the husband's claim in the instant case because it was based on an arrangement to contravene the revenue laws of a friendly foreign country.³ A transfer for consideration made by a person with the intention of defeating or delaying his creditors is merely voidable and not void *ab initio* and as such does not fall within the ambit of Section 23.⁴

Under the joint action of Section 6(b) of the Transfer of Property Act and Section 23 of the Contract Act, where the object of an assignment is fraudulent, the assignment is void and inoperative.⁵ The fraud has however to be proved.⁶ A compromise fraudulently effected would be void.⁷ Where both the plaintiff and the defendant are parties to the fraud and the fraud has already been successfully committed, the plaintiff is not entitled to any

1. *Adenna v. Jaggarayadu*, A.I.R. 1916 Mad. 75.

2. *Re Emery's Investments' Trusts. Emery v. Emery*, [1959] 1 All E.R. 577 C.D. ; *Gascoigne v. Gascoigne*, [1918] 1 K.B. 223, followed.

3. *Re Emery's Investments' Trust. Emery v. Emery*, [1959] 1 All E.R. 577 ; *Regazzoni v. K. C. Seihia (1944), Ltd.*, [1956] 2 All E.R. 487, applied.

4. *Parashram v. Sadashao*, A.I.R. 1936 Nag. 268.

5. *Jafeer Meher Ali v. Budge-Budge Jute Mills Co.*, (1907) 34 Cal. 289 ; *Immani Appa v. Ramalingamurthi*, A.I.R. 1962 S.C. 371.

6. *Mahomed Mira v. Savvasi Vijaya*, (1900) 23 Mad. 227 P.C.

7. *Goculdas v. Lakhmidas*, (1879) 3 Bom. 402.

relief from the Court on the maxim *in pari delicto potior est conditio possidentis*.¹

A person occupying fiduciary position was entrusted with the task of selling a woman's property. While so engaged he entered into agreement with a prospective purchaser whereby the former agrees with the latter to see that the sale was settled in favour of that purchaser for a lesser price though better prices were offered, and for which he was to get commission at 5 per cent. on the sale price. The contract for commission between the purchaser and the person entrusted with the sale was unenforceable as being fraudulent and also opposed to public policy.²

A creditor in consideration of a money makes a private agreement with the insolvent not to oppose the final discharge of the insolvent. It is opposed to public policy and is in fraud of creditors.³ In cases of composition, where all creditors have joined in on equal terms and a secret preference is given to certain creditors to induce their agreement to the composition, then the contract whereby such a preference is given is void under Section 23 as being a contract based on fraud.⁴

Injurious to person or property.—When the consideration or object of an agreement involves or implies injury to the person or property of a third person, the consideration or object is unlawful. An agreement of which the consideration or object is thus unlawful is void, that is, unenforceable. *A*, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void as it implies a fraud by concealment by *A* on his principal.

Where both parties do not show that there was any conspiracy to defraud a third person or to commit any other illegal act, the maxim of *in pari delicto* can hardly be made applicable. Public policy also demands that where fraud might have been contemplated but was not perpetrated the defendant should not be allowed to perpetrate a new fraud.⁵ An agreement between a servant and his master's broker, inconsistent with relations of master and servant is opposed to public policy and therefore void.⁶ An honest agreement not to bid against each other is lawful, but one with an object of defrauding a third person is void.⁷

Immoral.—When the consideration or object of an agreement is such that the Court regards it as immoral, the consideration or object is unlawful. An agreement of which the consideration or object is thus unlawful is void,

1. *Ram Lal v. Rajendra*, A.I.R. 1933 Oudh 124; *Inmani Appa. v. Ramalingamurthi*, A.I.R. 1962 S.C. 371.

2. *Manikka v. Peria Muniyandi*, A.I.R. 1936 Mad. 541.

3. *Naoroji v. Sidick Mirza*, (1896) 20 Bom. 636.

4. *Atumal Ramoomal v. Dipchand Kessurmali*, A.I.R. 1939 Sind 33.

5. *Kedar Nath v. Prahlad*, A.I.R. 1960 S.C. 213.

6. *Vinayakrav Ganpatrav v. Ramsordas Pranjivandas*, 7 Bom. H.C. O.C.J. 90.

7. *Ram Lal v. Rajendra Nath*, A.I.R. 1933 Oudh 124.

that is, unenforceable.¹ *A*, who is *B*'s *mukhtar*, promises to exercise his influence, as such, with *B* in favour of *C* and *C* promises to pay Rs. 1,000 to *A*.² The agreement is void because it is immoral. *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code, 1860. Illustration (j) to Section 23 thus also exemplifies that whenever the object of an agreement is to exercise one's influence on a person occupying a fiduciary position and thereby to cause detriment or loss to the beneficiary or *cestui que trust*, it is immoral.³

There is a conflict of authority on the question whether past cohabitation is a lawful consideration.⁴ One view is that a promise to pay a woman an allowance by reason of past cohabitation is really an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to the man for which no consideration, as defined in the Contract Act, would be necessary.⁵ In the earlier case of *Man Kuar v. Jassodha* the view was taken that past cohabitation is not an immoral consideration, and an agreement based thereon is not void for want of consideration.⁶ Another view is that past cohabitation is not a good consideration for the promise or a transfer to pay for it, and that a consideration which was immoral at the time it was supplied, and, therefore, would not support an immediate promise to pay, does not become innocent by being past.⁷

The Allahabad High Court also has later taken the view that adultery, in India, being an offence against the criminal law, cohabitation, past or future, if adulterous, is not merely an immoral but an unlawful consideration.⁸ The Patna High Court takes the view that though a contract to enter into the relationship of protector and mistress is immoral, unenforceable and void in law yet the case of a contract to compensate for what she has lost on account of past association with the promisor is not immoral.⁹

In accepting either of these conflicting views the judge, jurist, or the law-giver is faced with a dilemma. Should the woman be allowed, on the ground of the public policy of the law, to enforce a promise made in her favour when the said promise was made for compensating her, wholly or in

1. *Dulari v. Vallabhdas*, (1889) 13 Bom. 126.

2. *Mohan Lal v. Udai Narayan*, (1910) 14 C.W.N. 1031 : 7 I.C. 2.

3. *Kotharaju v. Tekunalla*, A.I.R. 1960 Andhra 370.

4. Fifth Indian Law Commission, *Thirteenth Report (Contract Act, 1872)*, pp. 24-25, para. 49.

5. *Dhiraj Kuar v. Bikramajit*, (1880) 3 All. 787 : (1881) A.W.N. 57.

6. *Man Kaur v. Jossodha*, (1876-78) 1 All. 478.

7. *Husseinali v. Dinbai*, 68 I.C. 240 : A.I.R. 1924 Bom. 135 : 25 Bom. L.R. 252 ; *Ganapathy v. Sundararaja*, 124 I.C. 153 ; *Chandrakali v. Sambhu*, A.I.R. 1935 Oudh 71 ; *Kisondas v. Dhondu*, (1919) 44 Bom. 542 : A.I.R. 1920 Bom. 142 : 57 I.C. 472 ; *Sabava Yellappa v. Imanappa*, A.I.R. 1933 Bom. 209 ; *Deivanagaya v. Muthu Reddi*, 44 Mad. 329 : A.I.R. 1921 Mad. 326 : 59 I.C. 1003.

8. *Alice Mary Hill v. William Clarke*, 27 All. 266 ; *Mahtabunnissa v. Rifaqat Ali*, A.I.R. 1925 All. 474 : 85 I.C. 459.

9. *Godfrey v. Parbati*, 17 Pat. 308 : A.I.R. 1938 Pat. 502.

part, for something she had already voluntarily done for the promisor, or should she be non-suited, again, on the ground of public policy of the law, because the promise was made for her having done something in the past which according to the public policy of the law was immoral? In England past cohabitation is no consideration to render an agreement valid or enforceable. But there, too, a contract under seal, made in consideration of past seduction or cohabitation can be enforced, not because it is binding in honour and conscience but because it is a specialty and has not been made for an executory consideration of illegal nature.¹ The fact that, in England, a covenant to pay money in consideration of future cohabitation is void, though under seal,² goes, however, to show that the operativeness of a covenant or assignment made in consideration of past illicit cohabitation is the result of compassionate feelings on the part of the judges rather than of the form of the deed or document in question. The allowance shown in favour of the woman for the services rendered in the past is not likely to encourage seduction or illicit cohabitation in the community. On the whole, therefore, it may be observed that an agreement compensating for past illicit cohabitation or seduction may be allowed operativeness, and not one for future seduction or cohabitation. Whatever the earlier view, the High Courts in India have of late adopted this view perhaps as a compromise of morals and compassion. It will also be noted that this view also fits with the construction of Section 25(2) of the Contract Act. Section 25(2), in a given class of cases, only dispenses with consideration as it is understood under the English common law. It does not dispense with the requirements of lawfulness of the object, that is, of the purpose, of a given agreement in order to render it enforceable. Now, what is the object of a promise made in consideration of past cohabitation? The object of an agreement being the ultimate end or purpose the agreement is intended to subserve, the object of the promise in question is only to compensate a woman for her past services rendered to the promisor, and this object may properly be accepted as not being opposed to public policy. Cohabitation, whether past or future, should never be considered as sufficient consideration in order to render a promise enforceable.³

In *Husseinali v. Dinbai*, A.I.R. 924 Bom. 135, it was observed that the word 'voluntarily' must necessarily exclude anything done at the request of the promisor. But this is not strictly true. As it will be seen under Section 25,

1. *R. v. Bernhard*, [1938] 2 K.B. 264; [1938] 2 All E.R. 140; *Nye v. Moseley*, (1826) 6 B. & C. 133.

2. *Benyon v. Nettlesfold* (1850), 3 Mac. & G. 94; *Ayerst v. Jenkins* (1873), L.R. 16 Eq. 275.

3. *Sabava Tellappa v. Yamanappa*, A.I.R. 1933 Bom. 209; *Alice Mary Hill v. William Clarke*, (1905) 27 All. 266; *Kisondas v. Dhondhu*, (1919) 44 Bom. 542; A.I.R. 1920 Bom. 142; 57 I.C. 472; *Husseinali v. Dinbai*, A.I.R. 1924 Bom. 135; *Ganapathy v. Sundararaja*, 124 I.C. 153; *Chandrakali v. Shambhu*, A.I.R. 1935 Oudh 71; *Deivanayaga v. Muthu Reddi*, 44 Mad. 329; A.I.R. 1921 Mad. 326; 59 I.C. 1003; *Mahtabunnissa v. Rifaquat Ali*, A.I.R. 1925 All. 474; 85 I.C. 459.

post, an act may be said to be voluntarily done even if it is done at the desire of the person benefiting. 'Voluntarily' means without having any intention to create a legal obligation. Macleod, C.J., and Crump, J., also observed that "something which the promisee has done at the desire of the promisor before the promise is given, is good consideration provided it is lawful under the provisions of Section 23. It cannot be said that the object of an agreement to provide for the future maintenance of a mistress after the connection has ceased is unlawful, but the consideration for an agreement is quite separate from the object and both must be lawful to make the agreement enforceable at law." Their lordships proceeded further: "A consideration which is immoral at the time and therefore would not support an immediate promise to pay does not become innocent by being past. There can be no difference whether A says to B 'I will give you Rs. 1,000 a month if you live with me for a year', or 'I will give you Rs. 12,000 because you have lived with me for a year.' The consideration therefore of past cohabitation is unlawful as being immoral or opposed to public policy." It will be submitted that their lordships were correct when they observed that the object of an agreement to provide for future maintenance of a mistress after the connection has ceased is not unlawful, but the reasoning of their lordships while considering 'consideration' in the context of Section 25(2) is circular. The observation of their lordships that both consideration and object must be lawful to make an agreement enforceable at law in order to be an accurate statement of the law has to be treated as being confined to cases of agreement where consideration is necessary. Under Section 25(2), consideration has been dispensed with, and hence the question of legality or illegality of past cohabitation as consideration does not arise. It is the public policy of the law under Section 23 and the non-indispensability of consideration under Section 25(2) that renders the promise in question valid and enforceable. Where, however, the object of a promise is to compensate a woman for future cohabitation it will be opposed to public policy and will therefore render the promise unenforceable.

The fact that in certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral.¹

A custom, stated to exist among the Hindus of the Pakhali caste by which the marriage tie could be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, was not recognised by the Court.²

Where a transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory.³

1. *Sabava Yellappa v. Yamanappa*, A.I.R. 1933 Bom. 209.

2. *Keshav Hargovan v. Bai Gandi*, (1915) 39 Bom. 538.

3. *Thasi Muthukannu v. Shunmugavelu*, (1905) 28 Mad. 413.

If a plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail.¹

Where an agreement is illegal or immoral or one which is hit by Section 23 of the Contract Act, the money due under the agreement cannot be recovered by a change in the form of action based on another agreement which is naturally connected with or has for its support the original illegal agreement. Whether the plaintiff has to rely upon the illegal agreement, or whether it is brought out by the defence is immaterial; all that is material is the intimate connection between the two.²

Where the purpose of a loan incurred is not necessarily connected with an immoral object, the loan will be recoverable.³

Money was advanced by *N* to *V*, a married woman, in order to enable her to obtain a divorce from her husband. *V* promised to marry *N*, as soon as she should obtain a divorce. *N*'s money was irrecoverable, the agreement having an object *contra bonos mores*.⁴

A suit by an adopted daughter of a dancing girl for an account or a share in the profits of their immoral and illegal partnership is not maintainable.⁵ For further illustrations of immorality see *Consequence of illegality, ante*.

Contracts founded on considerations *contra bonos mores* are void *Ex turpi contractu non oritur actio*. But where a contract founded upon an immoral consideration has been executed, neither law nor equity will interfere to set it aside if both parties have been equally in fault for *in pari delicto potior est conditio defendentis*. Yet, in England, a contract under seal, made in consideration of past seduction or cohabitation, can be enforced; not because it is binding in honour and conscience, for such a reason is not sufficient, but because it is a speciality, and has not been made for an executory consideration of an illegal nature.⁶ The covenant to pay money in consideration of future cohabitation is void, though under seal.⁷ To let a house, or voluntarily to allow the tenancy of a house to continue, for the purpose of its being used as a brothel is to aid in an immoral purpose, which vitiates all contracts relating thereto which are made by persons having knowledge of such purpose.⁸

In India, too, although future illicit cohabitation cannot support a pro-

1. *Bani Muncharam v. Regina Stanger*, (1908) 32 Bom. 581.

2. *Kali Kumari v. Mono Mohini*, A.I.R. 1935 Cal. 748; *Fisher v. Bridget*, 3 E. & B. 642; 2 C.L.R. 928; 23 L.J. Q.B. 276; *Geere v. Mare*, 2 H. & C. 339; 33 L.J. Ex. 50; *Clay v. Ray*, 17 C.B. (N.S.) 188; 144 E.R. 76.

3. *Khubchand v. Beram*, (1889) 13 Bom. 150.

4. *Bai Vijli v. Nansa Nagar*, (1886) 10 Bom. 152.

5. *Gangamma v. Kuppammal*, A.I.R. 1939 Mad. 139.

6. Wharton: *Law Lexicon*, 493; *R. v. Bernhard*, [1938] 2 K.B. 264; [1938] 2 All E.R. 140; *Nye v. Moseley*, (1826), 6 B. & C. 133.

7. *Benyon v. Nettlefold* (1850), 3 Mac. & G. 94; *Ayerst v. Jenkins* (1873), L.R. 16 Eq. 275.

8. Stroud: *Judicial Dictionary*, 3rd edn., 1952, vol. 2, 1367; *Choga Lal v. Piyari*, (1909) 31 All. 58.

mise for the reason that it is an immoral consideration, yet, it is thought, there is nothing wrong in a promise made in consideration of past cohabitation.¹ A few cases are given below. It is however, submitted that the decisions in cases involving past cohabitation or past seduction, though sound as conclusions, do not appear to be based on any cogent reasoning. See *supra*, *Immoral*.

A promissory note executed by the promisor in consideration of past illicit intercourse is valid and enforceable. As there is nothing immoral in remunerating a woman who has rendered services for such past services, the consideration is considered to be good.² Bonds or covenants founded on past cohabitation whether adulterous, incestuous or simply immoral are valid in law and not liable, unless there are other elements in the case, to be set aside in equity. Bonds or covenants if given in consideration of future consideration of further cohabitation are void in law. Where the consideration is the past cohabitation, the bond or covenant will be valid even if the continuance of cohabitation is not ruled out. That is to say, if the evidence discloses specifically that future cohabitation formed part of the consideration, then the agreement is void in law, but if the agreement relates to past cohabitation, it is not rendered invalid by the mere fact that the parties contemplate a continuance of cohabitation.³

Where a transaction, though completed, is intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executory or executed.⁴ The exploitation of the necessitous, careless, and inexperienced is to be extirpated in the interest of the community as contrary to individual morality as well as to public policy.⁵

Opposed to public policy.—When the consideration or object of an agreement is considered unlawful by the Court as being opposed to public policy, the agreement is void under Section 23 of the Indian Contract Act.⁶

Public policy.—Freedom of contract is the rule; restrictions are exceptions.⁷ The interests of the community in a few cases, however, require that the freedom of contract should not be left unfettered.⁸ The doctrine by which contracts are held to be void on the ground of public policy is based

1. *Man Kuar v. Josodha Kuar*, 1 All. 478, 480.

2. *Kothanadani v. Dhanammal*, A.I.R. 1943 Mad. 253; *Lakshminarayana v. Subhadri*, 13 M.L.J. 7; *Namberumal v. Veeraperummal*, A.I.R. 1930 Mad. 956; 128 I.C. 689; 59 M.L.J. 596.

3. *Rama Rao v. Jayamma*, A.I.R. 1953 Mysore 33.

4. *Istak Kamu v. Ranchod Zipru*, A.I.R. 1947 Bom. 198; *Thasi Muthukannu v. Shunmugavelu*, (1905) 28 Mad. 413; *Kandaswami v. Narayanaswami*, (1923) 45 M.L.J. 551; 76 I.C. 306; *Mt. Roshun v. Muhammad*, (1887) Punj. Rec. 46; *Ghumna v. Ram Chandra Rao*, A.I.R. 1925 All. 437; 88 I.C. 411.

5. *Abdul Majeed v. Khirode Chandra*, (1915) 42 Cal. 690.

6. *Narasimharaju v. Gurumurthy*, (1963) 1 S.C.A. 257; A.I.R. 1963 S.C. 107.

7. *Printing and Numerical Registering Co. v. Sampson*, (1875), L.R. 19 Eq. 462.

8. *Fender v. St. John-Mildmay*, [1938] A.C. 1, 12, 22, 38.

upon the necessity in certain cases of preferring the good of the general public to an absolute and an unfettered freedom of contract on the part of the individuals.¹ The doctrine of the public policy of the law enables the Court to do justice.² Public policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good which may be termed the policy of the law, or public policy in relation to law.³ Public policy with reference to contracts means the principles under which the freedom of contracts or profit dealings is restricted by law for the good of the community.⁴ The doctrine is extended not only to harmful cases but also to harmful tendencies.⁵

The interests of the community, that is, the safety of the State, the economic and social well-being of the State and its people as well as the administration of justice have persuaded the Courts as the guardians of the community to declare some contracts void as being opposed to public policy.⁶ The concept of the interests of the community is incapable of any exact connotation. Social and societal changes bring about changes as to the contents of the concept of the interests of the community.⁷ Even at a given point of time, different communities may and do entertain different ideas as to their respective needs. Even in the same community different personalities, though contemporaneous and equally disciplined, may have different ideas as to the contracts in which judicial interference will be deemed justifiable on the ground of public policy. Freedom of contract being the rule, and restrictions the exception, caution has been advised in the application of the principle of public policy in relation to the law.⁸ The observation that "public policy is a very unruly horse, and when once you get astride of it you never know where it will carry you"⁹ seems to imply, it is submitted, that earlier judicial precedents will be a safer guide than the philosophy of the judge who is concerned with the application of the principle of public policy.¹⁰ The Courts have again and again said that where a contract does

1. *Wilson v. Carnley*, [1908] 1 K.B. 729; *Bhagwant Genuji v. Gangabisan Ramgopal*, A.I.R. 1940 Bom. 369.

2. *Raghavalu v. Adinarayana*, (1909) 32 Mad. 323.

3. *Egerton v. Brownlow (Earl)*, (1853), 4 H.L. Cas. 1, 196.

4. *Wharton: Law Lexicon*, 14th edn., 1953, 818; *Gulabchand v. Kudilal*, (F.B.), A.I.R. 1959 M.P. 151.

5. *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781.

6. See *Frauds on the public*, below.

7. *Evanturel v. Evanturel*, (1874), L.R. 6 P.C. 1, 29; *Wilson v. Carnley*, [1908] 1 K.B. 729, 737; *Monkland v. Barclay, (Jack), Ltd.*, [1951] 2 K.B. 252, 265; [1951] 1 All E.R. 714, 723.

8. *Richardson v. Mellish*, (1824), 2 Bing. 229, 252.

9. *Richardson v. Mellish*, (1824), 2 Bing. 229, 252; *Cleaver v. Mutual Reserve Association*, [1892] 1 Q.B. 147.

10. *Fender v. St. John-Mildmay*, [1938] A.C. 1, 40; [1937] 3 All E.R. 402, 407, 426; *In re Mirams*, [1891] 1 Q.B. 594; *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, 507.

not fit into one or the other of these pigeon-holes but lies outside this charmed circle, the Courts should use extreme reserve in holding a contract to be void as against public policy and should only do so when the contract is incontestably and on any view inimical to the public interest.¹

As Baron Alderson observed :

"The truth is, that an active imagination may find a bad tendency arising out of every transaction between imperfect mortals; and to use this as a criterion for determination, would make every case depend on the arbitrary caprice of an acute Judge.

The principle, then, to be extracted from all this, seems to me to be, that in all the ordinary transactions of business or contract in human life, if the object expressed be impossible or illegal, the condition is void; and that if it be physically possible, but impossible except by doing an illegal act, it is void also. But that the mere tendency, on some remote and not very probable supposition, that what is not expressed to be the object may, nevertheless, possibly be considered to be the object, will not make the condition void."²

In the words of Baron Parke: "This (public policy) is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expedience," or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion... The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principles, the objection ought to prevail."³

Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.⁴ The doctrine of public policy already established by precedent will, of course, be moulded to suit new conditions,

1. *Monkland v. Jack Barclay*, [1951] 2 K.B. 252 ; Stroud : *Judicial Dictionary*, 3rd edn. 1953, vol. 3, 2386 ; *Gopi v. Gokhei*, A.I.R. 1954 Orissa 17 ; *Gulabchand v. Kudilal*, (F.B.), A.I.R. 1959 M.P. 151 ; *Bhagwant Genuji v. Gangabisan*, A.I.R. 1940 Bom. 369 ; *Govind v. Pacheco*, 4 Bom. L.R. 948 ; *Sreenivasa v. Rama Mohana*, A.I.R. 1952 Mad. 579 ; *Srinivasdas v. Ramrattandas*, (1919) 44 Bom. 6 : 52 I.C. 546 ; *Vassandmal v. Hiromal*, A.I.R. 1947 Sind. 94 : (1946) Kar. 380 : 227 I.C. 633.

2. *Egerton v. Earl Brownlow & ors.*, H.L.C., (1852-54) vol. iv, 1, 109.

3. *Egerton v. Earl Brownlow & ors.*, H.L.C., (1852-54) vol. iv, 1, 123.

4. *In re Mirams*, [1891] 1 Q.B. 594.

though no new heads of public policy will now be created.¹ As the Court has the inherent power to mould the doctrine of public policy to suit new conditions, the list of situations wherein the doctrine will be applied cannot be said to have been closed either.²

In *Gulabchand v. Kudilal*, a Full Bench decision,³ an attempt has been made to give an exhaustive list of the classes of contracts which have been ruled by authorities as contrary to public policy. According to their Lordships, the recognised classes are :—

- (i) agreements which injure the State in its relation with other States;
- (ii) agreements tending to injure the public service;
- (iii) agreements which tend to prevent the course of justice;
- (iv) agreements which tend to abuse legal process;
- (v) agreements which affect the freedom or security of marriage or interfere with duties incumbent on individuals; and
- (vi) agreements which are contrary to morals.

It will be submitted that though the above classes of agreements are accepted as being void either by common or statute law, the list is not complete as will be abundantly clear from the judicial decisions themselves. In *Mufizuddin v. Habibuddin*, A.I.R. 1956 Cal. 336, it has been rightly observed that rules of public policy do not belong to a fixed or customary law. They are capable, on proper occasions, of expansion and modification. The Supreme Court of India also observed: "Though the doctrine of public policy is mostly governed by precedents, *theoretically speaking*, the heads are not closed, and a new head may be evolved in exceptional circumstances of a changing society."⁴ Of these two observations, the one made by the High Court at Calcutta is nearer the truth than the one made by the Supreme Court. The fact is that the heads of public policy could never be counted, or the fact-situations sought to be covered by the public policy ever ascertained. There is in the Courts as *custodes morum* of the people a residual power, where no statute had yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare.⁵ To quote Viscount Simonds, in *Shaw v. Director of Public Prosecutions*, [1961] 2 W.L.R. 897, at 917: "On the one hand it is said that it is not possible in the twentieth century for the Court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head". "In the sphere of criminal law I entertain no doubt," his lordship continued, "that there remains in the courts of law a

1. *Fender v. St. John-Mildmay*, [1938] A.C. 1.

2. *Bhagwant Genuji v. Gangabisa Ramgopal*, A.I.R. 1940 Bom. 369; *Wilson v. Carnley*, [1908] 1 K.B. 729; *Parduman v. Kashmiri*, A.I.R. 1943 Lah. 100; *Ranjeet Singh v. Ramlal*, A.I.R. 1951 M.B. 113.

3. A.I.R. 1959 M.P. 151. See also *per* Ekbote, J., in *Venkatareddi v. Venkatachalam*, A.I.R. 1964 Andhra 465.

4. *Gherulal v. Mahadsodas*, A.I.R. 1959 S.C. 781.

5. *Shaw v. Director of Public Prosecutions*, [1961] 2 W.L.R. 897, 912 H.L.

a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. . . . The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society."

As the term 'public policy' in fact does not admit of any precise definition and is not easily explained,¹ in ascertaining the principles of public policy judicial precedents play their vast importance.²

To take a few examples. It is not competent to any citizen to enter into a contract to do anything which may be detrimental to the interests of his own country. Such a contract is as much prohibited as if it had been forbidden by an act of the Legislature.³ A contract with an alien enemy or a resident in the enemy country or a resident in a country under the control of the enemy is thus illegal.⁴ A contract will be illegal if it may benefit the enemy even where the parties are both fellow nationals or a national and a neutral or both neutrals.⁵ An enemy national, unless a resident in England with the licence of the Crown can only be sued but himself cannot sue on any contract in a court in England.⁶

A contract which has not yet been executed, and a war has broken out, will not be suspended but rendered illegal if a party thereto has become a national or a resident of the enemy country or of a country under the control of the enemy. When only a part of the contract has been executed and a part remains executory the contract will be rendered illegal or treated as abrogated so far as the executory portion is concerned. Where however a contract has already been executed or partly executed and rights have accrued, the accrued rights are not abrogated but only kept suspended during the period of the war.⁷ Even where executory, rights arising out of a contract but as the concomitants of property are only suspended during the

1. *Davies v. Davies*, (1887) 36 Ch. D. 364; *Besant v. Wood*, (1879) 12 Ch. D. 620; *Egerton v. Earl Brownlow*, (1853) 4 H.L.C. 1; *Venkatareddi v. Venkatachalam*, A.I.R. 1964 Andhra 465.

2. *Richardson v. Mellish*, 2 Bing 252; *Cleaver v. Mutual Reserve Association*, [1892] 1 Q.B. 147.

3. *Furtado v. Rogers* (1802), 3 Bos. & P. 191, 198.

4. *Porter v. Freudenberg*, [1915] 1 K.B. 857; *Soerfracht v. Van Udens Scheepvarten Agentnuur Maatschappij*, [1943] A.C. 203; (1943) 1 All E.R. 76; *Vamvakas v. Custodian of Enemy Property*, [1952] 2 Q.B. 183; [1952] 1 All E.R. 629.

5. *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219, 257; [1946] 1 All E.R. 36, 40; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515; [1955] 1 All E.R. 46.

6. *Porter v. Freudenberg*, [1915] 1 K.B. 857; *Halsey v. Lowenfeld*, [1916] 2 K.B. 707; *Schaffenhuis v. Goldberg*, [1916] 1 K.B. 284.

7. *Erial Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260, 267, 274; *Esposito v. Bowden* (1857), 7 E. & B. 763, 792; *Ottoman Bank v. Jebara*, [1928] A.C. 269; *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219; [1946] 1 All E.R. 36; *Daimler Co., Ltd.*

hostilities.¹ There are, again, cases of contract which though executory and though not pertaining to rights as the concomitants of property have been allowed to be kept suspended and not treated as abrogated because of the outbreak of hostilities.² An agreement inimical or harmful to a friendly country or purporting to do a prohibited act there is also illegal.³

It is against public policy in England to allow an action to be brought on a promise to marry, made by a man who at the time of making it was known to be married.⁴ A promise made between decrees *nisi* and absolute to marry after decree absolute is not contrary to public policy.⁵ Where the lawful wife was alive any agreement by the husband to marry another is unenforceable as being contrary to public policy. Even when the given persons go through a ceremony of marriage they will not be deemed to have been lawfully married. By a person promising to marry another the former impliedly warrants that he was in a position to do so, and as such he is liable for breach of the said implied warranty. Where the person giving the warranty has died the person damaged will be entitled to special damages.⁶ A provision in a life policy that the insurers will pay in the event of the suicide of the assured while sane is void, at least as against the personal representatives of the assured. *Semble*, it would not be void as against an assignee for value of the policy.⁷ The doctrine avoiding a contract which in effect deprives a man of the means of supporting himself and his family is affirmed.⁸ A provision engrafted on to an absolute bequest and modifying it according as the beneficiary was or was not for the time being married to his then present wife, was held to be contrary to public policy, although the parties were separated when the will came into operation.⁹ A condition subsequent in a will may be held void on the ground of public policy.¹⁰ The Name and Arm clause in a will, as a condition subsequent, in given circumstances, may not be opposed to public policy.¹¹

A gift by an English testator for the benefit of German soldiers disabled in the 1914-1918 War was, in England, held not contrary to public policy,

v. Continental Tyre and Rubber Co. (Gl. Britain), Ltd., [1946] 2 A.C. 307; *Arab Bank, Ltd. v. Barclays Bank, Ltd.*, [1954] A.C. 495; [1954] 2 All E.R. 226.

1. *Ertel Bieber & Co. v. Rio Tinto Co., Ltd.*, [1918] A.C. 260; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 252; [1946] 1 All E.R. 47.

2. *Bevan v. Bevan*, [1955] 2 Q.B. 227; [1955] 2 All E.R. 206.

3. *Foster v. Driscoll* (1929) 1 K.B. 440; *De Wutz v. Hendrick's* (1824), 2 Bing. 314; *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1957] 3 All E.R. 286 H.L.

4. *Wilson v. Cranley*, [1908] 1 K.B. 729; Wharton: *Law Lexicon*, 14th ed., 1953, 818.

5. *Fender v. St. John-Mildmay*, [1938] A.C. 1.

6. *Shaw v. Shaw & anr.*, [1954] 2 All E.R. 638 C. A. See under Section 73, vol. 2, for damages.

7. *Beresford v. Royal Insurance Co.*, [1938] A.C. 586.

8. *King v. Michael Faraday & Partners Ltd.*, [1939] 2 K.B. 753.

9. *In re Caborne*, [1943] Ch. 224.

10. *Egerton v. Earl Brownlow*, (1853) 4 H.L.C. 1.

11. *In re Neeld, decd. Carpenter v. Inigo-Jones & others*, [1960] 2 W.L.R. 730 C.D.; see also *In re Howard's Will Trusts. Levin & ors. v. Bradley & ors.*, [1961] 2 W.L.R. 821.

but a valid charitable gift.¹ A gift to existing illegitimate children who can be ascertained without an inquiry into their real parentage is valid.²

Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the Government, whatever its complexion, e. g., marriage brokerage contracts, contracts for the sale of honours, contracts in restraint of trade, and so on.

A contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void.³ An agreement tending to stifle a prosecution for a public offence is illegal.⁴ The law of England permits a compromise only of the offences, though made the subject of criminal prosecution, for which the injured party might sue and recover damages in an action.⁵ Where the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. Matters of public concern cannot be the subject of a lawful compromise. As to *Stifling prosecution*, see below.

To avoid a contract it is not enough that it affords a motive to do wrong; it must surely be shown that such a contract generally affords a motive and that it is likely to be effective.⁶

The rules of public policy in relation to law are applied also to foreign contracts. Thus a foreign contract though valid according to the law by which it was to be governed may be declared unenforceable in a given country.⁷ The matrimonial law of England is adapted to the Christian marriage and it is wholly inapplicable to polygamy. A potentially polygamous marriage although it was a valid marriage by the *lex loci* and at the time the man and woman were single, will not be recognized by the English matrimonial Court as a valid marriage in a suit instituted by one of the parties against the other for the purposes of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations.⁸

Parties were married in 1947 and the husband presented his petition for nullity in 1959, alleging incapacity or wilful refusal. The wife relied upon approbation and delay. It was held that in considering approbation the

1. *In re Robinson*, [1931] 2 Ch. 122.

2. *In re Hyde*, [1932] 1 Ch. 95.

3. *Cooper v. Willis* (1906), 22 T.L.R. 582; *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173; *Kearley v. Thomson* (1890), 24 Q.B.D. 742; *Clubb v. Hutson* (1865), 18 C.B. (N.S.) 414; *Gipps v. Hume* (1861), 2 John. & H. 517; *Egerton v. Brownlow* (1853), 4 H.L. Cas. 1.

4. *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351; *Keir v. Leeman* (1846), 9 Q.B. 371; *Brook v. Hook* (1871), L.R. 6 Exch. 89; *Collins v. Blantern* (1767), 2 Wils. 341.

5. *Fisher & Co. v. Apollinaris Co.* (1875), 10 Ch. App. 297.

6. *Fender v. St. John-Mildmay*, [1932] A.C. 12.

7. *Robinson v. Bland* (1760), 2 Burr. 1077; *Dynamit Act. v. Rio Tinto Co.*, [1918] A.C. 292; *Kaufman v. Gerson*, [1904] 1 K.B. 591.

8. *Sowa v. Sowa*, [1961] 2 W.L.R. 313 C.A.; *Hyde v. Hyde* (1866), L.R. 1 P & D. 130; *Baindail v. Baindail*, [1946] P. 122, 125; 62 T.L.R. 263; [1946] 1 All E.R. 342 C.A.

duty of the Court was to apply the test laid down by the House of Lords in *G. v. M.* (1885), 10 App. Cas. 171 H.L., to all the circumstances of the case. If, having done that, the Court concluded that it would be most inequitable and contrary to public policy to grant a divorce no residual discretion remained. The mere delay did not constitute approbation. As the husband had never expressed himself as satisfied with the existing sexual relations and the wife had refused to have the simple necessary operation carried out, the husband was entitled to a decree of nullity.¹

Agreements which are immoral or are against public policy cannot be enforced.² Courts will not enforce illegal contracts even if the illegality has not been pleaded by defendant.³ The Court itself ought to raise questions of public policy if none of the parties does so.⁴

There is no substantial justification for holding that 'public policy' should be interpreted under Section 23 of the Contract Act as comprehending all the political or administrative policies of the Government.⁵ Neither Sections 23, 26, and 27 of the Contract Act can be regarded as exhausting all the instances of agreement which are contrary to public policy.⁶ Section 23 which renders unlawful the consideration of an agreement which is opposed to public policy does not sanction the recovery of the property which forms such consideration after the object of the agreement has been fulfilled.⁷ See also *Miscellaneous cases of public policy*, below.

Stifling prosecution.—The essential element in stifling a prosecution is the tampering with the administration of justice. Stifling prosecution is a recognised head of public policy, and even if part of the consideration was the undertaking not to proceed with the prosecution, the entire agreement would be illegal.⁸

Even if a part of the consideration of an agreement is shown to be the stifling of a non-compoundable offence the agreement must be held to be void. This however does not mean that the possibility of a prosecution or the existence of a threat to prosecute or even an actual prosecution makes it necessarily impossible for the possible or actual prosecutor and the possible or

1. *G. v. G.*, [1960] 3 W.L.R. 648 P.

2. *Dulari v. Vallabdas*, (1889) 13 Bom. 126.

3. *Ko Pa Tu v. Azimulla*, A.I.R. 1940 Rang. 73; *Alice Mary Hill v. William Clarke*, (1905) 27 All. 266; 1 A.L.J. 632; *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214. See also before.

4. *Beresford v. Royal Insurance Co. Ltd.*, [1933] A.C. 586.

5. *Shrinivasdas v. Ramchandra*, (1919) 44 Bom. 6.

6. *Lal Khan v. Kimman Khan*, A.I.R. 1924 Oudh 404.

7. *Ram Sumran v. Gobind Das*, (1926) 5 Patna 646.

8. *Chandanmal v. Ramakrishnayya*, A.I.R. 1942 Mad. 173; *Kamini Kumar v. Birendranath*, 57 Cal. 1302; A.I.R. 1930 P.C. 100; 123 I.C. 187; 57 I.A. 117; *Har Narain v. Ram Swarup*, A.I.R. 1941 Oudh 593; *Majibar Rahman v. Muktashed Hossein*, (1913) 40 Cal. 113; *Banu Mal v. Ratan Deo*, A.I.R. 1937 All 370; *Brahmdeo v. Brajaballabh*, (1940) 19 Patna 424; *Bhola Nath v. Rasool Baksh*, A.I.R. 1924 Oudh 243; *Veerayya v. Sobhanadri*, A.I.R. 1936 Mad. 656; *Mottai Reddy v. Thanappa Reddy*, (1914) 37 Mad. 385; see also *Queen v. Venkatachalam*, 2 Mad. H.C. 43, 44.

actual accused and others to enter into a bona fide legal transaction regarding the dispute the consideration or object of which was not to stifle a prosecution. It would be a public mischief if on reparation being made or promised by the offender or his friends and relatives, mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. In such a case the Court has to examine the conduct of the parties after a survey of the whole circumstances to find whether there was a bargain made on the terms of not prosecuting, and whether the circumstances are such as necessarily to give rise to an inference that there was an implied, if not an expressed, term that no prosecution would follow.¹

An agreement to compound a non-compoundable offence is void in law. Where the consideration was the compounding of a compoundable offence, the agreement is not void.²

In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand, to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so whole-heartedly in the interests of justice, and must not seek his own advantage.³

It may sometimes be difficult to draw the line between the acceptance of reparation by the party aggrieved and an agreement not to prosecute the offender. Nonetheless it is a real distinction. It is where an injured party forgets his duty to the State and exceeds his right of accepting reparation for the wrong done to him and enters the domain prohibited by law by agreeing to terminate the proceedings in a criminal Court in a manner otherwise than in accordance with law, that Section 23 applies and invalidates such an agreement. The agreement itself being unlawful, any consideration for such an agreement paid by the offender is also unlawful. It is not termination of every criminal proceeding by agreement between the injurer and the injured that will fall within the scope of Section 23 as being opposed to

1. *Premji Damodar v. Govindji & Co.*, A.I.R. 1943 Sind 197; *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173: 61 L.J. Ch. 138: 65 L.T. 685: 40 W.R. 273: 8 T.L.R. 133; *Kamini Kumar v. Birendranath*, 57 Cal. 1302: A.I.R. 1930 P.C. 100: 57 I.A. 117: 123 I.C. 187; *Bhowanipour Banking Corporation, Ltd. v. Durgesh Nandini*, (1940) Kar. P.C. 141: A.I.R. 1941 P.C. 95: 196 I.C. 463 (1942) 1 Cal. 1: 68 I.A. 144: 44 Bom. L.R. 1 P.C.; *Narasimharaju v. Gurumurthy*, A.I.R. 1963 S.C. 107; *Radhakishan v. Bhima*, A.I.R. 1963 M.P. 139.

2. *Ahmed Hassan v. Hassan Mahomed*, (1928) 52 Bom. 693; *Raja Ram v. Charanji Lal*, A.I.R. 1939 Lah. 98; *Sayamma v. Punamchand*, (1933) 57 Bom. 678; *Loganathan v. Ponnuswami*, A.I.R. 1964 Mad. 327.

3. *Bhowanipore Banking Corporation, Ltd. v. Durgesh Nandini*, A.I.R. 1941 P.C. 95; *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587: 60 L.J. Ch. 564: 65 L.T. 314; *Dalsukhram v. Charles de Britton*, (1904) 28 Bom. 326.

public policy. Section 345, Cr. P. C., permits an injured person to compound specified offences. It may be that that compounding is effected after reparation is made for the wrong done to the injured party. But it is not the acceptance of that reparation that invalidates compounding even of the offences specified in Section 345. It is only where recourse is not had to Section 345, and the agreement between the injurer and the injured is to terminate the criminal proceedings against the injurer otherwise than in accordance with Section 345 of the Code of Criminal Procedure that the agreement would fall within the mischief of Section 23 of the Contract Act. What Section 345 permits cannot be viewed as unlawful or as opposed to public policy. If performance of an agreement to compound an offence is lawful under Section 345 of Criminal Procedure Code, the agreement itself can never become unlawful.¹

A pronote executed as consideration for compounding a charge of grievous hurt is void.² Where however there is no evidence to connect the prosecution with the execution of the promissory note, its execution cannot be held to be opposed to public policy.³

If it is an implied term of reference to arbitration, and of an *ekrarnama* pursuant to the award, that a complaint that a non-compoundable offence under the Penal Code has been committed shall not be proceeded with, the consideration is unlawful on the ground of public policy, and the award and *ekrarnama* are, therefore, unenforceable; that is so, irrespective of whether in law a prosecution has been commenced.⁴

A reference is invalid and the award which followed is inoperative where the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable case.⁵

A after his conviction under Section 379 of the Indian Penal Code on B's complaint entered into an agreement with B whereby B was allowed to retain certain property and to enjoy it during her life and she was not to contest the appeal by A from his conviction either in person or through a pleader. A succeeded in his appeal and his conviction and sentence were set aside. It was held that since the agreement between the parties was arrived at due to the criminal case it was void as being against public policy.⁶

A threat to prosecute is not itself illegal. Where there is a just and bona fide debt actually existing and there is a good consideration for giving a security and the transaction between the parties involves a civil liability as well as possibly a criminal act, a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give

1. *Meenakshi v. Subramania*, A.I.R. 1955 Mad. 369.

2. *Motta Reddy v. Thanappa Reddy*, (1914) 37 Mad. 385.

3. *Loganathan v. Ponnuswami*, A.I.R. 1964 Mad. 327.

4. *Kamini Kumar v. Birendranath*, (1930) 57 Cal. 1302 P.C.; A.I.R. 1930 P.C. 100; *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173 applied.

5. *Motumal Issardas v. Ibrahim*, A.I.R. 1944 Sind 80.

6. *Matta Jaggilodu v. Byramma*, A.I.R. 1941 Patna 349.

security for a debt which he justly owes to his creditor.

According to the definition of the word "illegal" in Section 43 of the Indian Penal Code, compounding an offence other than those made compoundable by Section 345 of the Code of Criminal Procedure will be illegal as such compounding is a thing prohibited by Section 345 (7) of the Code of Criminal Procedure. Hence an agreement to compound a non-compoundable offence is thus forbidden by law, and when such an agreement will constitute the consideration for or be the object of an agreement the latter will fail to develop into a contract. But where the consideration for the transaction of a pronote with an equitable mortgage is the promisee's undertaking not to sue the promisor in damages for tort or money had and received in quasi contract it is a perfectly lawful consideration. The object of the agreement is not the stifling of the prosecution. No infirmity therefore attaches to the contract.¹

There is a distinction between the motive to a transaction and its object or consideration, and to avoid an agreement as being against public policy it is not enough that the motive which impelled the party who undertook the liability under the agreement was that a pending criminal case should be withdrawn. An agreement not to object to the withdrawal of the complaint in respect of a non-compoundable offence is against public policy since it is the duty of the complainant to wholeheartedly proceed with prosecution in the interests of justice. It makes no difference if, in spite of his agreement, the complainant subsequently resolves to proceed with the case and the accused is ultimately convicted. What matters is the consideration or object of the agreement, and not what transpired subsequently. Such an agreement is therefore void.²

Where the dispute was really a civil one and the criminal proceedings were merely a subsidiary matter, the deed of compromise between the parties should not be held to be void on the ground that one of the parties agreed not to press the proceedings in the criminal Court.³

Where the complaint is about non-compoundable offences but the sworn statement discloses offences which are only compoundable, the parties are at liberty to compound, and an agreement in respect of such compoundable offence is not invalid.⁴

Money obtained from the plaintiff by the defendant under an agreement to stifle a pending non-compoundable criminal prosecution, is money paid under coercion within the meaning of Section 72 of the Contract Act, and

1. *London and Lancashire Insurance Co. Ltd. v. Binoy Krishna*, A.I.R. 1945 Cal. 218.

2. *Shripad v. Sanikatta Co-operative Salt Sale Society*, A.I.R. 1945 Bom. 82; *Bhowanipur Banking Corporation, Ltd. v. Durgesh Nandini*, A.I.R. 1941 P.C. 95: 68 I.A. 144: (1941) Kar. P.C. 141: (1942) 1 Cal. 1: 196 I.C. 463; *Jones v. Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173; *Kamini v. Birendra*, 123 I.C. 187: 57 I.A. 117: 57 Cal. 1302: A.I.R. 1930 P.C. 100; *Jaggilodu v. Byamma*, 199 I.C. 876: A.I.R. 1941 Pat. 349.

3. *Jagdish v. Kausilla*, A.I.R. 1947 All. 317.

4. *Kalianna v. Settia*, A.I.R. 1946 Mad. 80.

can be recovered back. The maxim *in pari delicto potior est conditio defendentis* does not apply to such a case.¹

The fact that the money was actually paid as the result of an arbitration is immaterial if the plaintiff's consent to the arbitration was obtained by means of the prosecution.²

A complaint regarding a compoundable offence was compromised, the accused agreeing to give half of his house to the complainant. The complainant sued to enforce the agreement but it was found that the complaint was false and was instituted by the complainant with the object of exercising coercion on the accused. In the circumstances, the compromise was void as the consideration was against public policy.³

A contract for payment of money in respect of which a criminal prosecution is permissible under the law, is not by itself opposed to public policy. The consideration and object of such a contract is not illegal within the meaning of Section 23. The withdrawal of the prosecution in the case might be the motive, but not certainly the object or the consideration of the contract so as to render the agreement illegal.⁴

There is nothing against public policy if a person accused of criminal breach of trust or misappropriation acknowledges his liability and refunds the amount.⁵ A compromise which is otherwise a fair and reasonable one is not invalidated because in connection therewith a trifling charge of theft between the servants of the parties has been withdrawn.⁶

Where the withdrawal of the complaint is due to the debtor having executed a pro-note in favour of the creditor, but such withdrawal is not the consideration of the pro-note the pro-note is not invalid.⁷

In a suit on a promissory note it appeared that it had been given by the defendant to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, who were not, though the insolvent was, aware of this transaction whereby the plaintiff was to obtain a special advantage, it was held that the suit could not be maintained.⁸

1. *Williams v. Hedley* (1807), 8 East, 378; *Unwin v. Leaper*, (1840), 1 M. & G. 747; *Atkinson v. Denby* (1861), 6 H. & N. 778 followed.

2. *Muthuveerappa v. Ramaswami*, (1917) 40 Mad. 285.

3. *Sanaullah v. Kalimullah*, A.I.R. 1932 Lah. 446; *Krishnen v. Kunhunni*, (1871-74) 7 M.H.C. 378 followed.

4. *Deb Kumar v. Anath Bandhu*, A.I.R. 1931 Cal. 421; *Dwijendra v. Gopiram*, 53 Cal. 51; A.I.R. 1926 Cal. 59; 89 I.C. 200.

5. *Narasimhalu v. Naina*, A.I.R. 1929 Mad. 7; *Flower v. Sadler* (1882), 10 Q.B.D. 572; *Dwijendra v. Gopiram*, 53 Cal. 51; A.I.R. 1926 Cal. 59; *Widya Wanti v. Jai Dayal*, A.I.R. 1932 Lah. 541; *Badar Uddin v. Mehr Din*, (1928) 107 I.C. 605.

6. *Onkar Mal v. Ashiq Ali*, (1927) 49 All. 540; *Dwijendra v. Gopi Ram*, (1925) 29 C.W.N. 855 followed.

7. *Shanti Sarup v. Lal Chand*, A.I.R. 1927 Lah. 530; *Karm Chand v. Basant Kaur*, 31 P.R. [1911]; 192 P.L.R. [1911]; 11 I.C. 321; 236 P.W.R. 1911 followed.

8. *Krishnappa v. Adimula*, (1897) 20 Mad. 84.

A complaint petition of two widows in a criminal case was with regard to two offences under Sections 379 and 352 of the Indian Penal Code, and the widows withdrew the criminal case because of a compromise effected between the parties and because the accused had given to the two widows, who were the complainants, some land for their maintenance during their life time. The said transaction was considered as illegal as being hit by Section 23 of the Contract Act.¹

Where the defendant who had committed defalcations of a bank amount and on being discovered, creates an equitable mortgage of the property in favour of the bank to repay the amount and the bank accepts the mortgage, the mortgage is not void, in the absence of anything to show that the bank had agreed in consideration of the contract not to prosecute the defendant for the defalcations. An agreement on the part of the plaintiff not to prosecute, a contract whereby he agrees as a part of the consideration either not to bring or discontinue criminal proceedings for some alleged offence, would be void.² It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the judges, and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with.³ Where the vendor executes a sale-deed in consideration of the withdrawal of a pending criminal prosecution against him by the vendee who obtains possession of the land sold, the transaction is void and the vendor can recover neither the consideration money nor the land. The fact that the vendee succeeded in obtaining possession only after the acquittal of the vendor as a result of the withdrawal of the prosecution and the sale-deed had been subsequently compulsorily registered does not improve the vendor's position.⁴

No refund of money or return of consideration given under an agreement not to prosecute a criminal case will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitute undue influence.⁵

An agreement to compound an offence compoundable without the permission of the Court is lawful, there being no law or public policy violated in such a case. Only in the case of a non-compoundable offence the agreement will be unlawful. There is no rule of public policy preventing the parties from compounding offences specified in Section 345 (2) of the Code of

1. *Dhanwantia v. Deonandan*, A.I.R. 1957 Patna 477.

2. *Ramchandra v. Bank of Kolhapur*, A.I.R. 1952 Bom. 315.

3. *Sudhindra Kumar v. Ganesh Chandra*, (1939) 1 Cal. 241 : A.I.R. 1938 Cal. 840.

4. *Brahmdev Narayan v. Brajaballabh*, A.I.R. 1940 Patna 573 ; *Amjadunnessa v. Rahim Buksh*, 42 Cal. 286 : A.I.R. 1916 Cal 74 : 28 I.C. 713 : 19 C.W.N. 383 : 21 C.L.J. 642.

5. *Brahmdev Narayan v. Brajaballabh*, A.I.R. 1940 Patna 573 ;

Criminal Procedure before the matter has reached the criminal Court. But once the matter has reached the criminal Court, an agreement to compound it without the leave of the Court would, if permitted, defeat the provisions of Section 345 (2) of the Code of Criminal Procedure.¹ In the case of a compoundable offence or of an offence which may be compounded with the leave of the Court, an agreement to withdraw prosecution between the complainant or the prosecutor on the one hand and the accused or another person closely interested in the welfare of the accused on the other is not against public policy and is accordingly valid.²

An act may involve a person in a civil as well as a criminal liability for a non-compoundable offence, the liability depending on proof. The mere fact that an agreement may be made with regard to the civil liability while a possibility of prosecution criminally is existing will not render the agreement void but if that agreement is made and part of the consideration for it on the side of the aggrieved party is an agreement not to prosecute criminally then the agreement is void. If the agreement as to the civil liability changes the nature or the extent of the original civil liability, for example, if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be a strong indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. The additional advantage so conferred by the agreement cannot be enforced in law, though it would be open to a party to fall back upon the original civil liability and enforce it. This distinction would, with greater reason, apply where the foundation of the original civil liability is wholly unconnected with the act which is made the foundation of the criminal offence.³

The agreement between the trustee and the beneficiary substituted for what was an unascertained liability of the latter a fixed sum of money, a part of the consideration being the withdrawal of the pending non-compoundable criminal cases by the beneficiary. It was held that the agreement was void and must be totally ignored and the trustee could not claim the sum of money specified in the agreement or plead that the suit as framed was not maintainable on the ground that the accounts had already been settled. The parties were in law relegated to the position they occupied before the agreement was executed and whatever rights they then had remained intact and could be enforced subject to the law of limitation.⁴

1. *Chandamal v. Ramakrishnayya*, A.I.R. 1942 Mad. 173; *Veerayya v. Sobhanadri*, (1937) Mad. 471; A.I.R. 1936 Mrd. 656; 167 I.C. 148; (1937) 1 M.L.J. 489.

2. *Lewai Khan v. Goolreze Khan*, A.I.R. 1941 Rangoon 231.

3. *Deb Kumar v. Anath Bandhu*, A.I.R. 1931 Cal. 421; 131 I.C. 133; 35 C.W.N. 26; *Gopal v. Lakshmi*, A.I.R. 1933 Cal. 817; 147 I.C. 492; 37 C.W.N. 749; *Sudhindra v. Ganesh Chandra*, (1939) 1 Cal. 241; A.I.R. 1938 Cal. 840; 179 I.C. 210; 43 C.W.N. 147; 69 C.L.J. 1; *Shrish Chandra v. Supravat*, A.I.R. 1940 Cal. 337; *Tek Chand v. Harias Rai*, A.I.R. 1929 Lah. 564.

4. *Shrish Chandra v. Supravat*, A.I.R. 1940 Cal. 337.

When there is a just and bona fide debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. There, as between the debtor and the creditor, there is no trading on felony, which public policy condemns, and the law attempts at preventing.¹

A threat to prosecute is not itself illegal; and the doctrine does not apply where a just and bona fide debt actually exists, when there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as possibly a criminal act. A threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give a security for a debt which he justly owes to his creditor.²

If the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt the security cannot be enforced in law.³

Even where there is in fact a civil liability to pay the amount of the money bond, the bond is void if one of the objects of executing the bond is a desire to secure release from criminal prosecution. The circumstance that the bond was executed on the same day on which the criminal proceedings were dropped is a piece of evidence which can lead a Court to the conclusion that the desire to save himself from the criminal prosecution was at least a part of the consideration which prompted the executant to execute the bond. But if in spite of this circumstance the Court comes to a conclusion that the bond was executed simply to discharge an existing civil liability and had nothing to do with the dropping of the criminal prosecution the bond is valid.⁴

A borrowed money from B by pledging a security which was found to be worthless and thus committed the offence of cheating. Subsequently through the mediation of C and D the matter was settled and on B agreeing to accept a smaller sum than was advanced by him and also to give time for the payment of that sum A, C and D executed a pronote in favour of B for the sum agreed. C and D were not under any pre-existing liability but were asked to join the execution of the pronote for the purpose of saving A from crimi-

1. *Sudhindra Kumar v. Ganesh Chandra*, (1939) 1 Cal. 241 : A.I.R. 1938 Cal. 840 ; *Gafoor v. Hemanta* A.I.R. 1931 Cal. 416 : 131 I.C. 574.

2. *Flower v. Sadler*, (1882) 10 Q.B.D. 572 ; *Jai Kumar v. Gauri Nath*, (1906) 28 All. 718 ; *Keir v. Leeman* (1844), L.R. 9 Q.B. 371, 392 ; *Dwijendra v. Gopiram Gobindram*, 53 Cal. 51 : A.I.R. 1926 Cal. 59 ; *Narasimhalu v. Naina*, A.I.R. 1929 Mad. 7.

3. *Sayamma v. Punamchand*, 57 Bom. 678 : 35 Bom. L.R. 850 : A.I.R. 1933 Bom. 413 ; *Kessoteji v. Hurjivan*, (1887) 11 Bom. 566 ; *Dwijendra v. Gopiram* (1926) 53 Cal. 51.

4. *Shib Charan v. Lachmi Narain*, A.I.R. 1951 All. 613 ; *Shaikh Gafoor v. Hemanta Shashi* A.I.R. 1931 Cal. 416.

nal prosecution. The agreement was held valid and *A, C and D* were liable on the pronote.¹

Under Section 23 an agreement is void if the entire consideration or a portion thereof was the agreement not to prosecute or to drop a prosecution which had already been started. This applies equally to the case of a guarantee but where no portion of the consideration can be traced to an agreement not to prosecute criminally or not to withdraw a pending criminal prosecution, the surety cannot escape the liability on the ground of an unlawful consideration. There is a clear cut distinction between the motive prompting an act and a consideration. If the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given with the motive of being saved from the risk of a criminal prosecution. Though the motive of the execution of a document may be the withdrawal of a non-compoundable criminal case, the consideration of an enforceable pre-existing liability is quite legal.²

The plaintiff deposited a sum of money with the defendant for standing surety for some of the accused in a certain criminal case punishable under Section 323 of the Indian Penal Code. The security was not for good behaviour. The defendant gave him a receipt for the sum so deposited, and agreed to refund the sum after the case was over. The agreement being not void either being illegal or against public policy was enforceable.³

In a case of an agreement to stifle prosecution it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. The fact that the debt forming the consideration was real is irrelevant. It is of course impossible for such a contract to be made unless both parties know of the proposal or actual proceedings. Proof that there has actually been a crime committed is obviously unnecessary. But it is necessary that each party should understand that the one is making his promise in exchange for the promise of the other not to prosecute or continue prosecuting.⁴ Where no intention was there on the complainant's part to spoil proceedings if police did not agree, the agreement was not one to stifle prosecution.⁵

Agreements which have stifling prosecutions as their objects seldom make a reference to pending proceedings which are sought to be stifled. Like many

1. *Chandanmal v. Ramakrishna yya*, A.I.R. 1942 Mad. 173.

2. *Har Narain v. Ram Swarup*, A.I.R. 1941 Oudh 593.; *Sudhindra v. Ganesh*, A.I.R. 1938 Cal. 840; *Kamini Kumar v. Birendra*, 57 Cal. 1302; A.I.R. 1930 P.C. 100; *Gopal v. Lakshmi Kanta*, A.I.R. 1933 Cal. 817.

3. *Dula Ram v. Akhey Raj*, A.I.R. 1952 Ajmer 28; *Fateh Singh v. Sanwal*, 1 All. 751; *Meherulla v. Sariatulla*, 57 Cal. 1093; A.I.R. 1930 Cal. 596 distinguished.

4. *Bhowanipur Banking Corporation, Ltd. v. Durgesh Nandini*, (1942) 1 Cal. 1; A.I.R. 1941 P.C. 95; *Kamini Kumar v. Birendra*, 57 I.A. 117; A.I.R. 1930 P.C. 100.

5. *Dwijendra v. Gopiram Gobindram*, A.I.R. 1926 Cal. 59.

other contracts they have to be inferred from the conduct of the parties after the survey of the whole evidence.¹

Section 23 was not applied to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, the law of that country permitting such a transaction.²

The question whether the consideration for the agreement to refer to arbitration the dispute between parties to a pending non-compoundable criminal case was to stifle the prosecution or not is a mixed question of law and fact. As a fact this would be binding upon the Court in second appeal, but whether those conditions did amount to stifling of prosecution in law and did make the contract illegal under Section 23 will be a question of law.³

Maintenance and champerty.—Maintenance means an officious intermeddling in a suit which in no wise concerns one, by assisting either party with money or otherwise to prosecute or defend it.⁴ It is in England, both actionable and indictable,⁵ and invalidates contracts involving it. By the Roman Law it was a species of *crimen falsi* to enter into any confederacy, or to do any act to support another's law suits, by money, witnesses, or patronage.

It is either *ruralis*, in the country, as where one assists another in his pretensions to lands, by taking or holding the possession of them for him; or where one stirs up quarrels or suits in the country; or, it is *curialis*, in a court of justice, where one officiously intermeddles in a suit depending in any court, which does not belong to him, and with which he has nothing to do. Maintaining suits in the spiritual courts was not within the statutes relating to maintenance.

A man may, however, maintain a suit in which he has any interest, actual or contingent; and also a suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Further, any legitimate common interest will justify a person or persons jointly subscribing to pay the expenses of a suit even where it is carried on by a third party,⁶ and a person will not be guilty of maintenance in indemnifying his customers from actions brought against them by a trade rival.⁷ An action for maintenance does not lie without proof of special damage. The success of the maintained action is not a bar to the right of action for maintenance.⁸

The offence of maintenance is punished in England by common law and also by statute by fine and imprisonment.

1. *Mohanlal v. Kashiram*, A.I.R. 1950 Nag. 71; *Kamini Kumar v. Birendra*, A.I.R. 1930 P.C. 100; 57 I.A. 117.

2. *Subraya v. Subraya*, 4. Mad. H.C. 14, 17.

3. *Ahmad Ullah v. Hafizullah* A.I.R. 1961 All. 173.

4. Wharton: *Law Lexicon*, 14th ed., (1953), 620, 621.

5. *Bradlaugh v. Newdegate*, (1883) 11 Q.B.D. 1.

6. *Martell v. Consett Iron Co.*, [1955] Ch. 363; *Dictionary of the English Law*, 1959, 1128.

7. *British Cash etc., Conveyors v. Lamson Store Service Co.*, [1908] 1 K.B. 1006.

8. *Neville v. London Express Newspaper*, [1919] A.C. 368.

Champerty or champerty, adopted from French '*champ parti*'; Latin '*campi partitio*', means literally, a division of the land. It is properly a bargain between a plaintiff or defendant in a suit and a third person, *campum partire*, to divide between them the land or other matter sued for in the event of the litigant being successful in the suit, whereupon the champertor is to carry on the party's suit or action at his own expense; or it is the purchasing the right of action or suit of another person. In England it is illegal both under common law and by statutes. Champerty is an aggravated form of maintenance.¹ It is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainer.

A contract may be void for champerty though not strictly within the criminal offence so-called.² An agreement by a solicitor with client that he should receive a specified portion of the money recovered is champertous.³

Champerty or maintenance is not a crime in India.⁴ The rigid English rules of champerty and maintenance do not apply in India.⁵ The validity of agreements under the Indian law of contract cannot therefore be challenged on the technical grounds of maintenance and champerty as they are understood under the English law. Even though the English laws of maintenance and champerty are not of force as specific laws in India, agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid on grounds of public policy.⁶

A transaction made for the purpose of financing a litigation is not, *per se*, invalid. The Court will, however, refuse to give effect to such a transaction if it appears that it is unconscionable or unfair or is otherwise opposed to public policy. In deciding as to whether a transaction is champertous, all

1. Wharton: *Law Lexicon*, 14th ed., (1953) 175; Stroud: *Judicial Dictionary*, 3rd ed., (1952), vol. 1, 440.

2. *Rees v. De Bernardy*, [1896] 2 Ch. 437.

3. *Haseldine v. Hosken*, [1933] 1 K.B. 822.

4. *Dara Shahpurji v. Askarai Begum*, A.I.R. 1954 Hyd. 98; *Abdul Kasim v. Ehsanul*, 24 Oudh Cas. 313; A.I.R. 1921 Oudh 207; *Venkata Pathiraju v. Subhadrayamma*, 47 I.C. 563; A.I.R. 1919 Mad. 718; *Latif v. Pandhari*, A.I.R. 1923 Nag. 214; *Ram Lal v. Nilkanth*, 20 Cal. 843; 20 I.A. 112; *Achal Ram v. Kazim Hussain*, (P.C.), 27 All. 271; 8 Oudh Cas. 155; 32 I.A. 113; *Seshayya v. Subbayya*, 82 I.C. 499; A.I.R. 1924 Mad. 87; *Banarsi v. Sital*, 121 I.C. 295; A.I.R. 1930 Lah. 392; *Ram Sarup v. Court of Wards*, (1940) Kar. P.C. 63; A.I.R. 1940 P.C. 19; *Scottish Union v. Roushan*, 20 Luck. 194; A.I.R. 1945 Oudh 152.

5. *In the matter of Mr. "G"*, A.I.R. 1954 S.C. 557; *Bhagwat Dayal v. Debi Dayal*, (1908) 35 Cal. 420 P.C.; *Kunwar Ram Lal v. Nil Kanth* (1893), L.R. 20 I.A. 112; 20 Cal. 843; *Ram Coomar v. Chunder Canto*, (1877) 2 Cal. 233 P.C.; *Inder Singh v. Munshi*, A.I.R. 1920 Lah. 123.

6. *Husain Baksh v. Rahmat Husain*, (1889) 11 All. 128; *In re K. L. Gauba*, A.I.R. 1954 Bom. 478; *Chedambara Chetty v. Renga Krishna* (1873-4) 1 I.A. 241 J.C.; *Ram Coomar v. Chunder Canto*, (1876-7) I.A. 23. J.C.; (1876) 2 Cal. 233 P.C.; *Venkataswami v. Nagi Reddy*, A.I.R. 1962 Andhra 457.

the circumstances surrounding it have to be weighed as a whole and it is not the mere disparity in consideration which should be the sole criterion for deciding whether a particular transaction is fair or not.¹ It is not the market value alone of the property that will be the guiding indicium. The commercial value of the claim, as determined by the problematical nature of the result of the litigation, will be more relevant for the purpose.²

Champertous agreements in India are not *per se* void.³ A fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, has not been considered in India as being opposed to public policy. There may be cases in which it may be just and proper to assist a suitor, who has a just title to property and no other means except the property itself to prosecute his case. Such agreements are however watched very carefully and they are not enforced as being opposed to public policy if they are (1) extortionate and unconscionable so as to be inequitable against the party, or (2) made not with the bona fide object of assisting a claim believed to be just and obtaining a reasonable recompense therefor but for improper objects as (a) for the purpose of gambling in litigation, or (b) of injuring or oppressing others by abetting and encouraging unrighteous suits. Where all the circumstances taken together leave no doubt that the respondent had entered into the agreement simply for gambling in litigation in the hope that he would be able to make a large profit it will be wholly opposed to public policy to enforce such a champertous agreement. Thus where in pre-emption proceedings the appellants had agreed that the respondents should proceed with the appeal at their own expense and that if they were successful, the appellants would pay them half the expenses and they would also divide the property half and half on the respondents paying half the sale price, the agreement between the parties was held undoubtedly champertous in its character.⁴

Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. In applying the principle⁵ that a fair agreement to supply funds to carry on

1. *Pannalal v. Thansing*, A.I.R. 1952 Nag. 195; *Passarilal v. Chuttanbai*, A.I.R. 1958 M.P. 417.

2. *Unnao Commercial Bank Ltd. v. Kailash Nath*, A.I.R. 1955 All. 393 (Luck); *Ram Coomar v. Chunder Canto*, 2 Cal. 233 P.C.; 4 I.A. 23; *Ram Sarup v. Court of Wards*, 67 I.A. 50; A.I.R. 1940 P.C. 19.

3. *Ram Coomar v. Chunder Canto*, (1877) 2 Cal. 233 P.C.; *Tarachand v. Suklal*, (1888) 12 Bom. 559; *Raja Mohkam Singh v. Raja Rup Singh*, (1893) 15 All. 352 P.C.; *Baldeo Sahai v. Harbans*, (1911) 33 All. 626; *Sadho Kandu v. Jhinka*, A.I.R. 1929 All. 456, *Alopi Parshad v. Court of Wards*, A.I.R. 1938 Lah. 23; *Ram Sarup v. Court of Wards*, (1940) 21 Lah. 1; *Ramanamma v. Viranna*, A.I.R. 1931 P.C. 100; *Indar Singh v. Munshi*, A.I.R. 1920 Leh. 123; *Fateh Jang v. Bute Khan*, A.I.R. 1934 Lah. 1017; *Kesho Das v. Tulsi Dass*, 89 I.C. 229; A.I.R. 1926 Lah. 43; *U Pe Gyi v. Mg Thein Shin*, 1 Rang. 565; 77 I.C. 372; A.I.R. 1924 Rang. 48; *Venkataswami v. Nagi Reddy*, A.I.R. 1962 Andhra 457.

4. *Suganchand v. Balchand*, A.I.R. 1957 Raj. 89; *Achal Ram v. Kazim Husain*, (1905) 27 All. 271; 32 I.A. 113; *Venkataswami v. Nagi Reddy*, A.I.R. 1962 Andhra 457.

5. *Zainab Begum v. Khurshed Begum*, A.I.R. 1963 Andhra 370.

a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy, it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must need risk losing his money he may well be allowed some chance of exceptional advantage.

A fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy.¹

While suits on promissory notes were pending, the plaintiff executed a deed of transfer by which he assigned the entire amounts due in respect of the suits for a consideration to be paid within a few days of the passing of the decrees in the suits. Decrees were passed in the suits. The transaction was held to be a completed one and a valid one.²

Where the agreement was not entered into for any improper object and there is no material on the record to hold that it was intended to encourage or abet litigation which is unrighteous in its nature and there was no question of gambling in litigation, and nothing was shown to indicate or to substantiate the proposition that the agreement was against the principles of equity or in any way unconscionable or extortionate the agreement is enforceable and it in no way contravenes the public policy.³ G, an advocate, entered into an agreement with his client which was embodied in his client's letter addressed to him. The letter read: "I hereby engage you with regard to my claim against the Baroda Theatres Ltd., for a sum of Rs. 9, 400 (balance due to me). "Out of the recoveries you may take 50 per cent of the amount recovered. I will by Wednesday deposit Rs. 200 in your account or give personally towards expenses." It was held by the Supreme Court that a contract of this kind was highly objectionable for a lawyer. A contract of this kind would be, it was further observed, legally unobjectionable if the party was not a lawyer by profession. It is highly reprehensible for a lawyer to stipulate for, or receive, a remuneration proportioned to the results of

1. *Ram Sarup v. Court of Wards*, A.I.R. 1940 P.C. 19.

2. *Mahanandi v. Venkataappa*, A.I.R. 1942 Mad. 21; *Glegg v. Bromley*, [1912] 3 K.B. 474; 81 L. J. K.B. 1081; 106 L.T. 825.

3. *Ramanamma v. Marina*, 131 I.C. 401; A.I.R. 1931 P.C. 100; *Dara Shahpurji v. Askarai Begum*, A.I.R. 1954 Hyd. 98.

litigation or a claim whether in the form of a share in the subject-matter, a percentage, or otherwise. He will, by so acting, offend the rules of his profession and so render himself liable to the disciplinary jurisdiction of the Court.¹ There was an agreement between S and his client at the time when he was engaged as an Agent by the latter that he would be paid, as his remuneration, a consolidated sum of Rs. 300, to which all out-pocket expenses would be added; but that in the event of the case being decided in favour of his client, he would have the benefit of the taxed costs. The question that arose for consideration was whether in taxing costs between party and party the appellants should be directed to pay to the respondent only what the latter agreed to pay to his Agent, or the respondent would have the full benefit of the taxed costs that would be normally allowed in such cases. The taxing officer of the Supreme Court held that the respondent could have from the appellants not the ordinary taxed costs, but a sum of Rs. 300 only plus the out-pocket expenses incurred by his Agent.

On a review of the said decision of the Taxing Officer, Mukherjea, J., held that the agreement in question was not tinged with maintenance or champerty and could therefore be given effect to. It was neither oppressive nor unreasonable. Order 40, Rule 46, of the Rules of the Court would be applied for the relief of the client in case the agreement between him and his Agent regarding the remuneration of the latter was oppressive or unreasonable.²

Borrowing money for the purposes of litigation on a promise by the vendee to run a law suit is not unlawful.³ A conveyance of property tending to foster gambling in litigation is void, as being unconscionable, speculative, and opposed to public policy.⁴ An agreement between parties that one should assist the other in carrying out litigation with the object of delaying execution of a decree is opposed to public policy and cannot be enforced by the Courts.⁵ A father as a manager of the joint Hindu family is not entitled to employ the joint family fund for a speculative litigation, and the joint family property is not liable for such act of the manager.⁶ A transaction in which an improper interest had been acquired in the unrighteous litigation of other people is champertous. The fact that a suit may be speculative does not render it champertous.⁷ An agreement for the purchase of a property *pendente lite* entitling the purchaser to cancel the agreement in case the suit was decided against the seller leaving him no interest in the property is not

1. *In the Matter of Mr. "G"*, A.I.R. 1954 S.C. 557; *In re Bhandara*, 3 Bom. L.R. 102; *Ganga Ram v. Devi Das* (F.B.), 61 Punj. Record 1907, 280.

2. *Firm of N. Peddanna v. Srinivasayya Setti Sons*, A.I.R. 1954 S.C. 26; *Bavah Meah Saib v. Khajee Meah Saib*, (1868-9) 4 M.H.C. 218, 224 (reprinted 1897); *Smith v. Guneshee Lal*, (1871) 3 N.W.P. 83 (reprinted 1908); *Rav Saheb V. N. Mandlik v. Kamaljabai*, (1873) 10 Bom. H.C. 26, 33.

3. *Durga v. Jamna*, A.I.R. 1924 Oudh 234.

4. *Debi Dayal v. Bhan Pertap*, (1904) 31. Cal. 433.

5. *Nand Kishore v. Kunj Behari*, A.I.R. 1933 All. 303.

6. *Nand Kishore v. Kunj Behari*, A.I.R. 1933 All. 303.

7. *Siva Ramayya v. Ellamma*, (1899) 22 Mad. 310.

champertous.¹ In a suit to recover money given to finance litigation the burden of proving that the litigation was just and that the agreement to finance it was just and equitable is on the plaintiff.²

Where the litigant party to the champertous agreement retained a solicitor to conduct the litigation, and the solicitor was ignorant of the champertous agreement, then the contract of retainer between the litigant party and the solicitor was unexceptionable. But if the solicitor was aware of the terms of the champertous agreement, then, in principle, the contract of retainer between the litigant and the solicitor being an agreement to the doing of a series of illegal acts was void and unenforceable.³

Marriage brokerage contracts.—Brokerage means the wages or hire of a broker.⁴ It is also termed 'brokerage'.⁵ A marriage brokerage contract is a contract whereby a person undertakes, for reward, to promote marriage, and is not confined to a contract for bringing about a marriage with a particular individual but comprises all contracts for promoting marriages for reward.⁶ Such a contract is now void in England at law as well as in equity. Marriage brokerage means a consideration paid for contriving a marriage. Such consideration is considered illegal also in India as being contrary to public policy.⁷

Marriage brokerage contract where a third person intervenes and wants to make money out of the marital relationship is against public policy and not enforceable by a Court of law. Similarly, contracts for receiving pecuniary gains either by the father of the groom or of the bride in consideration of giving his son or daughter in marriage have been condemned as opposed to public policy and repugnant to morals.⁸ Even where the groom himself is a contracting party it will make no distinction in the principle involved. Where, however, the gifts or presents by the parents of the groom or of the bride are made voluntarily on the occasion of the marriage it cannot be attacked as anything immoral or opposed to public policy. But when the pecuniary gain is made the consideration of the marriage, it will be condemned as reprehensible to all sense of decent morals.⁹

A contract for money payment for the negotiation of a marriage by a third party is opposed to public policy.¹⁰ A marriage brokerage agreement being unlawful and void *ab initio*, brokerage paid thereunder is recoverable if the agreement or substantial part of it is not performed. Such an agree-

1. *Ahmedbhoy v. Vulleebhoy*, (1884) 8 Bom. 323.

2. *Babu Ram v. Ram Charan*, A.I.R. 1934 All. 1023.

3. *In re Trepca Mines Ltd.*, (No. 2), [1962] 2 W.L.R. 800, 807 C.D.

4. *Cowel's Interpreter by Tho. Tanley*, 1672.

5. 12 Rich 2, c. 2.

6. *Hermann v. Charlesworth*, [1905] 2 K.B. 123.

7. *Pitamber v. Jagjivan*, (1889) 13 Bom. 131.

8. *Venkata Kristnayya v. Lakshmi Narayana* (F.B.), 32 Mad. 185; 3 I.C. 554.

9. *Suryanarayan v. Krishna*, A.I.R. 1957 Orissa 124; *Narayanan v. Patticharaveor*, A.I.R. 1945 Mad. 165 dissented from.

10. *Pitamber v. Jagjivan*, (1889) 13 Bom. 131.

ment does not fall within Section 65 of the Contract Act.¹ A contract for bride-price is illegal. A custom sanctioning such contract is opposed to public policy.² An agreement to assist a Hindu for reward in procuring a wife is void as being contrary to public policy.³ The parents of a girl caused her to enter into an utterly unsuitable marriage, the husband agreeing to pay a certain sum monthly for the maintenance of the parents. The agreement was opposed to public policy.⁴ A custom by which a person marrying a girl is bound to pay to her relatives a sum of money as bride price is immoral, in restraint of marriage and opposed to the principle of Section 26 and cannot therefore be enforced.⁵ A contract to make a payment to a father in consideration of his giving his daughter in marriage is immoral and opposed to public policy. Although a marriage when performed in the *asura* form is valid, an agreement to pay money to the father in consideration of such marriage is not valid; and the money cannot be recovered by suit. If however the money had been paid and the marriage solemnised, the money cannot be recovered back.⁶ The earlier view as taken in *Visvanathan v. Saminathan*, (1890) 13 Mad. 83, to the effect that the consideration of a promise of payment of a sum of money as embodied in a bond for *asura* marriage is not unlawful has been overruled in the Full Bench decision of *Venkata Kristnayya v. Lakshmi Narayana*, (1909) 32 Mad. 185. An arrangement between A and B that B's daughter shall marry A's son and that if she fails to do so, B shall pay a sum of money to A is opposed to public policy.⁷

A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract.⁸

Contract of marriage is not *per se* immoral and illegal.⁹ The burden of showing that a marriage contract is immoral and illegal is on the party which alleges it.¹⁰ Where neither party alleges that a marriage contract is immoral or illegal, and the plaintiff refuses to perform the marriage and carry out the agreement and is unwilling to disclose the reasons which have led him to break the contract, he will be entitled to the refund of the money paid by him to the defendant. The Court is entitled from the unwillingness of the plaintiff for reasons for delicacy to disclose the reasons, to assume that the plaintiff must have special good reasons which forced him to break the contract. The plaintiff will not however be entitled to the refund of that part of the money which had already been expended by the defendant towards

1. *Srinivasa v. Sesa*, (1918) 41 Mad. 197.

2. *Abbas Khan v. Nur Khan*, A.I.R. 1920 Lah. 357.

3. *Vaithyanatham v. Gangarazu*, (1894) 17 Mad. 9.

4. *Baldeo Sahai v. Jumna*, (1901) 23 All. 495.

5. *Abbas Khan v. Nur Khan*, A.I.R. 1920 Lah. 357.

6. *Venkata Kristnayya v. Lakshmi Narayana* (F.B.), (1909) 32 Mad. 185; 3 I.C. 554: 18 M.L.J. 403.

7. *Devarayan v. Mutturaman*, (1914) 37 Mad. 393.

8. *In the matter of Gunput Narain*, (1876) 1 Cal. 74.

9. *Sudha v. Sankappa*, A.I.R. 1963 Mysore 245.

10. *Bakshi v. Nadu*, 1 C.L.J. 261; *Baldeo v. Jumna*, 23 All. 495.

the purpose for which it was given. Even where a marriage contract was immoral and illegal, *per se*, and therefore void *ab initio*, the defendant could not retain the amount which he had received from the plaintiff because the plaintiff in suing to recover possession of his money was not carrying out the illegal transaction but was seeking to put himself and the defendant as far as possible in the same position as they were before that transaction was determined upon, and it was the defendant who was relying upon the illegal contract and was seeking to make title to the money through and by means of it. Though the money could not have been recovered had the contract been carried out, it could be recovered since the immoral purpose was not carried out.¹

A contract for payment of bride or bridegroom price cannot be enforced. Where money was advanced but marriage could not or did not take place, it is refundable.² Ornaments given in consideration of marriage were recoverable when the marriage did not take place because of the defendant's refusal.³

The plaintiff had entered into an agreement with respondents 1 and 2 by which the latter had agreed that the former's daughter, who was a minor, would be married to respondent 3 who was then the minor son of respondent 1. The agreement was that the plaintiff would pay a sum of Rs. 1,000 and would also give silver and brass utensils to the value of Rs. 152. The *tilak* ceremony was performed, and the money paid. On an inquiry the plaintiff found that the bridegroom was an epileptic subject. The plaintiff then broke off the marriage and demanded back Rs. 1,152 which he paid to respondents 1 and 2. It was held that the money was paid for the marriage and no marriage had been performed. The performance of the *tilak* ceremony was no part of the performance of a marriage. The claim of the plaintiff could not therefore be resisted on the principle of part performance. Even if the contract was illegal, *per se*, and therefore void *ab initio*, the plaintiff was entitled to get back the money when the marriage was not performed.⁴ But when the *tilak* was forbidden under the Bihar Dowry

1. *Dharnidhar v. Kanhji*, A.I.R. 1949 Patna 250; *Bakshi v. Nadu*, 1 C.L.J. 261; *Venkata Kristnaya v. Lakshmi Narayana* (F.B.), 32 Mad. 185; 3 I.C. 554; *Ram Sumran v. Govinda Das*, 5 Pat. 646; A.I.R. 1926 Pat. 582; *Sonphula v. Gansuri*, 169 I.C. 901; A.I.R. 1937 Pat. 330; *Cohen v. Sellar*, [1926] 1 K.B. 536; 95 L.J.K.B. 629; *Petherapermal v. Muniandy*, 35 Cal. 551 (P.C.); 35 I.A. 98; *Srinivasa v. Seshaiyer*, 41 Mad. 197; A.I.R. 1918 Mad. 444; *Narayan Nambudri v. Patticharavoor*, A.I.R. 1945 Mad. 165; 221 I.C. 584; *Gulabchand v. Fulbai*, 33 Bom. 411; 3 I.C. 748.

2. *Gulabchand v. Harichaeed*, (1909) 33 Bom. 411; *Ganpat v. Lahana*, A.I.R. 1928 Nag. 89; *Dholidas v. Fulchand*, 22 Bom. 658; *Venkata Kristnaya v. Lakshmi Narayana*, (1909) 32 Mad. 185; 3 I.C. 554; 18 M.L.J. 403; *Devarayan v. Mutturaman*, (1913) 37 Mad. 393; 24 M.L.J. 310; 18 I.C. 515; (1913) M.W.N. 200; *Srinivasa v. Sesha*, 41 Mad. 197; 34 M.L.J. 282; 41 I.C. 783; 6 M.L.W. 42; *Gulabchand v. Fulbai*, 33 Bom. 411; 3 I.C. 748; 11 Bom. L.R. 649; *Bhan Singh v. Kaka Singh*, A.I.R. 1933 Lah. 849; *Ram Chand v. Audaito*, (1884) 10 Cal. 1054, 1056; *Juggeshur v. Panch Cowree*, 14 W.R. 154.

3. *Rambhat v. Timmayya*, (1892) 16 Bom. 673.

4. *Gopi Krishna v. Janak Prasad*, A.I.R. 1951 Patna 519; *Dharnidhar v. Kanhji*, A.I.R. 1949 Patna 250.

Restraint Act, 1950, *tilak* was irrecoverable even when the marriage had not taken place.¹

In *Narayanan Nambudiri v. Patticharavoor*, A.I.R. 1945 Mad. 165, it has been observed that a promise to pay a particular sum of money or to settle some property on a bride or bridegroom in consideration of her or his marrying the son or daughter of a promisor is not invalid and is not opposed to public policy.

In view of this conflict the Fifth Indian Law Commission suggested² that an agreement to procure the marriage of any person for reward as well as an agreement to pay money or deliver anything whose value can be expressed in terms of money to a parent or other guardian-in-marriage of any person in consideration of his consenting to the marriage of that person should be made illegal.

The Dowry Prohibition Act, 1961, has since been passed with effect from 1 June, 1961. Under this Act, giving, taking, or demanding dowry has been prohibited. For the purposes of the Act, dowry means any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to the other party to the marriage; or (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person; at or before or after the marriage *as consideration* for the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (Shariat) applies. Any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes, or other articles shall not be deemed to be dowry within the meaning of Section 2 of the Act, unless they are made *as consideration* for the marriage of the said parties. Under Section 5 of the Act, any agreement for giving or taking dowry is void. Under Section 8, any offence under the Act is non-compoundable. The Andhra Pradesh Dowry Prohibition Act, 1958, and the Bihar Dowry Restraint Act, 1950, have been repealed and replaced by the Dowry Prohibition Act, 1961, which extends to the whole of India except the State of Jammu and Kashmir.

As to marriage-brochage contracts, see also below.

Frauds on the public.—Agreements that are considered as frauds on the public³ will be void. Marriage-brochage contracts, as seen above, are also considered as frauds on the public.⁴ Though, under the English common law rule, under an illegal contract, money can only be recovered if there has been a total failure of consideration,⁵ equity in England has allowed money paid under a marriage-brochage contract to be recovered, even when there has been part performance of the contract by introductions, and even after the

1. *Rnmekbal v. Harihar*, A.I.R. 1962 Patna 343.

2. Thirteenth Report (Contract Act, 1872), 24 and 77.

3. *Perry v. Truefitt* (1842), 6 Beav. 66; *Newman v. Pinto* (1887), 57 T.R. 31 C.A.

4. *Earl of Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125.

5. *Taylor v. Bowers* (1876), 1 Q.B.D. 291; *Alexander v. Rayson*, [1936] 1 K.B. 169.

marriage has actually taken place.¹ In *Bigos v. Boustad*, [1951] 1 All E.R. 92, the illegal transaction was not carried out because of the frustration of the contract by the plaintiff and not because of any repentance on the part of the defendant and the agreement relating to the deposit of the share certificate was one which sprang from the main illegal agreement and was tainted with the same illegality as that which attached to that agreement, and the parties were *in pari delicto* at the time of making the agreement; *held*, the defendant was not entitled to seek the aid of the Court to recover the certificate. In case of marriage-brochage contracts, too, the same principle may be applied when the plaintiff seeks to recover the money even when there had been no part performance or when the marriage had not taken place. There can be no recovery where the reason for the non-fulfilment of the illegal purpose was not repentance by the plaintiff, but frustration by the defendant.² An author agreed to edit a book for a publisher who proposed to publish the book with name of another person on the title-page. The last mentioned person was to be represented as assisted by the real author. It was held that the author was entitled to resist specific performance, not only because the publisher's proposal violated his rights, but also because it involved a fraud on the public.³ The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.⁴ An agreement to avoid competition may be, in certain circumstances, a fraud on the public and therefore void.⁵

The expression "by any lawful agreement or compromise" in Order XXIII, rule 3, of the Code of Civil Procedure contemplates agreements which are not unlawful within the meaning of the Contract Act.⁶ An agreement whereby a widow of a deceased coparcener agrees not to adopt a son without the consent of the sole surviving co-parcener in consideration of the payment of an annual sum by way of maintenance is void as being opposed to public policy.⁷ An agreement on the part of the husband that he would not raise the question of his wife's unchastity as a ground for invalidating the decree that might be passed on the basis of a given award was obnoxious to public policy.⁸

Miscellaneous cases of public policy.—A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being

1. *Cole v. Gibson* (1750), 1 Ves. Sen 503; *Smith v. Bruning* (1700), 2 Vern 392; *Hermann v. Charlesworth*, [1905] 2 K.B. 123.

2. See Hanbury, *Modern Equity*, 8th ed., 1962, 664.

3. *Post v. Marsh* (1880), 16 Ch. D. 395.

4. The Specific Relief Act, 1963, Section 20.

5. *Jai Ram v. Kahna Ram*, A.I.R. 1963 Him. 3 does not appear to be a good decision. See also below for illustrative cases.

6. *Putto Lal v. Sumersinghi*, A.I.R. 1963 Raj. 63.

7. *Punjabrao v. Sheshrao*, A.I.R. 1962 Bom. 175.

8. *Audumbar v. Sonubai*, A.I.R. 1962 Bom. 35.

operated upon by a condition subsequent, and being made to cease and become void. The Earl of *Bridgewater* by his will devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord *Alford* for and during the term of ninety-nine years, if he shall so long live;" remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of *C. H. C.* for the term of ninety-nine years, if he shall so long live;" remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of *C. H. C.*, subject, nevertheless, as to the several uses and estates so to be limited to Lord *Alford* and *C. H. C.*, and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisoes for the determination thereof hereinafter contained." The testator then declared "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord *Alford* or of *C. H. C.*, in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord *Alford* and *C. H. C.* respectively". The testator then provided, "that if Lord *Alford* shall die without having acquired the title of Duke or Marquis of *Bridgewater* to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord *Alford* acquiring such title within five years after he should succeed to be Earl *Brownlow*, and unless he did so, the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if he said Lord *Alford* were actually dead without issue male." Lord *Alford* entered into possession of the estates, but died without acquiring either of the titles, leaving an heir male.

It was held by their lordships that the estate thus created in favour of Lord *Alford's* heirs male was not affected by the proviso, which was a condition subsequent, and which was void, *as being against public policy*, and therefore that the eldest son of Lord *Alford* was entitled to the estates as heir male under the limitation.¹

A condition in a will providing that an interest, which would otherwise have vested in a beneficiary on attaining twenty-one or marrying, should be forfeited if the beneficiary should at any time before attaining a vested interest be or become a Roman Catholic or not be openly or avowedly Protestant, was held void on the ground that it operated to interfere with a

1. *Egerton v. Earl Brownlow*, (1852-54) 4 H.L.C. 1.

parent in the exercise of his parental duty as regards the religious instruction of his children.¹

In *Scottish Union and National Insurance Co. v. Roushan Jahan Begam*,² it was observed that in India suicide is not against public policy as exhibited by the normal conception of society or as conceived by its laws, and that accordingly an insurance policy covering the risk of death by suicide is not opposed to public policy.³ It is needless to say that suicide has been condemned and prohibited by Hindu *shastras*⁴ as well as Islamic and Christian texts. It is also an act forbidden by the Indian Penal Code. In the circumstances it may be submitted that an insurance policy covering the risk of death by suicide should be viewed as being opposed to public policy. For the English equitable rule see *Beresford v. Royal Insurance Co.*, [1938] A. C. 586.

Where the plaintiff had been compelled to make a deposit under threat of a criminal prosecution by the Magistrate, the inference was irresistible that the plaintiff had been forced to make the payment, and the payment so made was made under coercion so as to attract Section 72. The Magistrate was in a position to dictate, and the plaintiff had no option but to submit to the will of the Magistrate. In view of this unequal position where one had the power to dictate, and the other had no alternative but to submit, the parties could not be said to be *in pari delicto*. Even though the money was paid in order to stifle prosecution, it could be recovered by the plaintiff because he paid the money under pressure which had been exercised upon him by the Magistrate.⁵

An arbitration agreement regarding an unlawful jute contract would attract the ban imposed by Section 23 of the Contract Act.⁶ An agreement was void because of an illegal consideration. The said agreement provided for reference. The agreement to refer was the very foundation of an order of reference. The order of reference was thus the creation of the agreement and had no greater validity than the agreement on which it was based. Consequently, where the agreement to refer was illegal and invalid the order of reference based upon that agreement was also invalid. Any subsequent applications and orders for reference to arbitration could not validate the originally invalid agreement and order of reference. They did not amount to a fresh submission or a fresh order of reference. Thus when there was no valid reference, the award, where any, was also a nullity.⁷ The

1. *In re Borwick*, [1933] Ch. 657.

2. A.I.R. 1945 Oudh 152.

3. See also *Advocate-General of Bengal v. Ranee Surnonoye Dossee*, 9 M.I.A. 387 : 1 Suther. 515 : 2 Sar. 39 P.C.

4. See Kane: *History of Dharmasastra*, vol. II, Part II (1941), 924—928; see also Kautilya: *Arthasastra*, Book IV, Chapter VII.

5. *Deputy Commissioner v. Har Narain*, A.I.R. 1956 All. 205; *Tricandras v. Bombay Municipal Corporation*, A.I.R. 1954 Bom. 427 relied on.

6. *Birla Jute Manufacturing Co., Ltd. v. Dulichand Pratapmull*, A.I.R. 1953 Cal. 450.

7. *Chhabbalal v. Kallu*, A.I.R. 1946 P.C. 72; *Carlisle, Nephews, & Co. v. Riknauth Buktcar Mull*, (1882) 8 Cal. 809.

reference being tainted with illegality at the root, subsequent consent did not cure the defect.¹

Two newspapers which ran "cross-word competitions" found that the prizes were got by a swindle. An employee of one newspaper explained the swindle on an undertaking by the newspaper not to use the information against him or divulge it to a third party. It was held that the undertaking was contrary to public policy. "It may well be permissible for a person against whom frauds have been and are intended to be committed to give a promise of secrecy in order to obtain information relating to them which will enable him, by taking steps himself, to prevent the commission of future frauds. . . . such a promise cannot however be held to be valid where it extends to frauds committed and contemplated against others to whom the communication of the information obtained would be of use in preventing the commission of such frauds."²

Where a claimant under Order 21, Rule 58, of the Civil Procedure Code withdraws his objections based on a *hatchitha* and agrees not to institute a suit under Order 21, Rule 63, of Civil Procedure Code in consideration of the decree holder's undertaking not to press his petition to the Court for enquiry into the genuineness of the *hatchitha* alleged by him to be a forged document, the agreement is void under Section 23 of the Contract Act.³ A *bona fide* purchase of a share in a claim to be enforced by a suit is not void under Section 23 of the Indian Contract Act, and a suit may, after such purchase, be properly brought by the vendee and vendors as co-plaintiffs.⁴

Money was paid to adoptive widow by way of inducement to her to adopt a particular boy. It could not form the consideration of a valid agreement.⁵ An agreement to give a son in adoption in consideration of an annual allowance to his natural parents was void.⁶ A clause in a *bona fide* compromise that the plaintiff should retain only one half of the property in case he failed to adopt the son of one of the defendants and give back the other half was not penal or opposed to public policy.⁷

The creation of heritable estates in order to take effect as successive life estates and inconsistently with the general law is opposed to the public policy of the law.⁸ A contract with regard to land which was calculated to defeat the rule against perpetuities which is one of public policy was void.⁹

1. *Nand Kishore v. International Mercantile Corporation (India) Ltd.*, A.I.R. 1953 Cal. 415.

2. *Howard v. Odhams Press, Ltd.*, [1938] 1 K.B. 1.

3. *Karnidan v. Sailoja*, A.I.R. 1940 Patna 683; *Kamini v. Birendra*, A.I.R. 1930 P.C. 100; 123 I.C. 187; 57 I.A. 117; 57 Cal. 1302; *Golap Jan v. Bholanath*, 38 Cal. 880; 11 I.C. 311; 15 C.W.N. 917.

4. *Abdool Hakim v. Doorga Proshad*, (1879) 5 Cal. 4.

5. *Sitaram v. Harihar*, (1911) 35 Bom. 169.

6. *Eshan Kishor v. Haris Chandra*, (1874) 13 Beng. L.R. Appx. 42.

7. *Subbaraju v. Narayanaraju*, A.I.R. 1926 Mad. 1093.

8. *Gnanasambanda v. Velu Pandaram*, (1900) 23 Mad. 271 P.C.

9. *Maharaj Bahadur v. Balchand*, (1920-21) 48 I.A. 376; *Dinkarrao v. Narayan*, (1923) 47 Bom. 191; *Jagannada v. Prasad Rao*, (1916) 39 Mad. 554; *Gopi Ram v. Jeot Ram*, (1923) 45 All. 478.

A custom may be bad in law.¹ *Pucca adat* usage is not opposed to public policy.² A custom recognising a right of heirship in an illegitimate son by an adulterious intercourse would be bad, being opposed to public policy.³ An ante-nuptial agreement binding one party to grant divorce or separation is opposed to public policy.⁴ The contract by the wife to suspend the operation of her maintenance decree for a period of one year in order to give her husband an opportunity of proving that he was willing to maintain her properly without cruelty or neglect far from being opposed to public policy is in the interests of family life.⁵ A stipulation by a Mahomedan husband to make an allowance to his wife in case of separation does not offend against the rule of public policy.⁶ An ante-nuptial agreement on the part of the Hindu husband that he will never be at liberty to remove his wife from her parental abode, was held as defeating the rule of Hindu law and therefore was invalid on that ground as well as on the ground that it was opposed to public policy.⁷ An agreement by Hindus that upon the happening of a certain event a marriage was to become null and void was opposed to public policy.⁸ An agreement between husband and wife providing for an immediate re-union coupled with a provision for subsequent separation is bad.⁹ A provision tending to invade the sanctity of the marriage bond is void as being opposed to public policy.¹⁰

Under the Mahomedan law, a husband may give his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband.¹¹ A Muhammadan husband executed a *kabinnamah* in favour of his wife authorising her to divorce herself from the husband in the event of his marrying a second wife. He, however, married a second wife. The contract was not void as being opposed to public policy.¹² An ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Muhammadans) with the object of securing the wife against ill-treatment and of ensuring her a suitable amount of maintenance in case such

1. *Rajah Vurmah v. Ravi Vurmah*, (1876-78) 1 Mad. 235 P.C.

2. *Jot Ram v. Jiwan Ram*, A.I.R. 1932 Lah. 633.

3. *Narayan v. Laving*, (1878) 2 Bom. 140.

4. *Rambhabai v. Kanji Ravji*, A.I.R. 1953 Sau. 88.

5. *Venkata Krishnayya v. Lakshamma*, A.I.R. 1944 Mad. 17.

6. *Muhammad Ali v. Fatima Begam*, A.I.R. 1929 Lah. 660; *Mansur v. Mt. Azizul*, 3 Luck. 603; A.I.R. 1928 Oudh 303, and *Muhammad Muin-ud-Din v. Jamal Fatima*, 43 All. 650; A.I.R. 1921 All. 152 relied on; *Bai Fatma v. Alimahomed*, (1913) 37 Bom. 280; 17 I.C. 946; 14 Bom. L.R. 1178 dissented from.

7. *Tekait Mon Mohini v. Basanta Kumar*, (1901) 28 Cal. 751.

8. *Sitaram v. Aheeree*, (1873) 11 Bengal L.R. 129; *Chait Ram v. Nathi*, (1900) 35 Punj. Record, Part I, No. 15 (Civil).

9. *Meherally v. Sakerkhanoobai*, (1905) 7 Bom. L.R. 602.

10. *In re Caborne*, [1943] Ch. 224.

11. *Hamidoola v. Faizunnissa*, 8 Cal. 326.

12. *Maharam Ali v. Ayesa Khatun*, A.I.R. 1916 Cal. 761; *Ayatunnessa v. Karam Ali*, (1909) 36 Cal. 23.

treatment was meted out to her, was not void as being against public policy.¹

In some cases on the other hand it has been held that an agreement for future separation arrived at between husband and wife (who were Mahomedans) was void as being against public policy under Section 23 of the Indian Contract Act.² It may however be submitted that in view of the polygamous system obtaining among the Mahomedans, the power of separation given in favour of the wife in the given cases will tend to serve the purpose of the public policy of the law rather than to harm it.

Where under the terms of a bond for Rs. 100 executed by defendant in favour of plaintiff, the defendant was to do *pannai* work in lieu of interest and on failure to do *pannai* work, the plaintiff was at liberty to realise the principal amount and the losses arising therefrom by proceeding against the defendant personally and his property, it was held that the bond was not a slavery bond or illegal or opposed to public policy.³ A contract to do gratuitous service for a certain number of days in a year in lieu of rent for the land occupied is not illegal as being against public policy.⁴ Where in a bond the executant bound himself down to daily attendance and manual labour until a certain sum was repaid in a certain month, and it penalised default with overwhelming interest, the bond was not enforceable at law being opposed to public policy.⁵ A *naukrinama* to serve on a petty sum of Rs. 2 per month for 112½ months was regarded as contrary to public policy. Such a contract was not enforceable. Nor did an action lie against a person who might be responsible for dissuading another from performing such a contract which was regarded as contrary to public policy.⁶ An agreement by which a man binds himself to associate for the whole of his life only with a certain body of his fellowmen and to abstain completely from associating with another body is one which ought not to be enforced and for breach of which no penalty can be claimed.⁷ It has been held in *Dayabhai & Co. v. Commissioner of Income-Tax*, A.I.R. 1966 M.P. 13, that a partnership in motor transport can be carried on the strength of a permit issued in favour of a partner.

A contract which grants a person a monopoly of lorry traffic on a road to the exclusion of all other members of the public is opposed to public policy and cannot be enforced.⁸ A contract purporting to be licence granted to the

1. *Md. Muin-ud-Din v. Jamal Fatma*, (1921) 43 All. 650; *Bai Fatma v. Alimahomed Aiyeb*, (1912) 37 Bom. 280 distinguished.

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3. *Karuppanna v. Pambayan*, A.I.R. 1927 Mad. 531.

4. *Radhu Hari v. Narendra*, A.I.R. 1929 Cal. 224.

5. *Ram Sarup v. Bansi Mandar*, (1915) 42 Cal. 742.

6. *Sitaram v. Baldeo*, A.I.R. 1958 M.P. 367.

7. *Lal Khan v. Kimman Khan*, A.I.R. 1924 Oudh 404.

8. *District Board, Jhelum v. Hari Chand*, A.I.R. 1934 Lahore 474; *Somu Pillai v. Municipal Council, Manayavaram*, (1905) 28 Mad. 520 followed; *Hamara Radio Co. v. State of Rajasthan*, A.I.R. 1964 Raj. 205.

defendant, giving him exclusive right to collect hides of animals in a particular area in the plaintiff's zamindari, amounts to granting a monopoly to the defendant and is unenforceable by reason of Section 23 of the Contract Act.¹ Where a litigant has agreed to give property to certain person in consideration of latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for it is opposed to public policy and is therefore illegal.² A promissory note executed in consideration of giving evidence is unenforceable whether the statement which a person may have promised to give be either true or false.³ An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his Vakil was bound to see to in consideration of his fee is opposed to public policy and is void and unenforceable.⁴ A mortgage taken by a legal practitioner in the course of his money-lending business may sometimes offend the rule of discipline or conduct for legal practitioners but is not void as being prohibited by law or opposed to public policy within the meaning of Section 23 of the Contract Act.⁵

The plaintiff by a contract undertook to perform some kind of *puja* in order to cause the defendant to be successful in a suit which he had before the Courts. In the event of his success the plaintiff was to get one tenth of the decree money. The agreement was held to be contrary to public policy.⁶ On the other hand there is the view that there is nothing wrong in a party to a suit asking somebody else to offer prayers to God in his name for the success of his suit.⁷ It will be submitted that though much can be said in defence of either of the views, any *puja*, prayer, or *doa* in the circumstances may be viewed as an attempt at influencing the mind of the judge and thus tampering with the course of administration of justice, and as such should be discountenanced in a court of law. A *karnavan* could not part, by agreement, so as to be unable to resume them, with the privileges and duties which attached to his position as such.⁸

If an agreement confers or amounts to a recognition of a party's exclusive right to perform religious services for the whole village, it is in restriction of a trade, profession, or calling and can be enforced only if the restriction is reasonable. If the agreement is to be construed as perpetually restricting the other party from exercising his calling in the whole village it is void under Section 27 of Contract Act. An agreement restricting the privilege to a

1. *Kameshwar Singh v. Yasin Khan*, A.I.R. 1938 Patna 473.

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4. *Suryanarayana v. Subbayya*, (1918) 41 Mad. 471.

5. *Saran Behari v. Kanhiya Lal*, A.I.R. 1953 All. 276; *Ram v. Raghubansa*, 72 I.C. 877: A.I.R. 1923 Oudh 3.

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8. *Chorukomea v. Ismala*, 6 Mad. H.C. 145.

certain caste or class of persons may be legally enforceable; but if it extends the privilege to the whole village for ever it is one which would offend against public policy.¹

A *kaikagada* under which certain amount is paid as a consideration with the object that a *shanbhogue* should not revert to his post and the person making the payment should continue in his place as a *shanbhogue* is void under Section 23, as its object is opposed to public policy.²

In *Girijanund v. Sailajanund*, (1896) 23 Cal. 645, it was held that a priest could enter into a compromise by relinquishing his claim in favour of another priest in consideration of an annual payment out of the offerings to their common deity, such compromise not being held as opposed to public policy. An *archaka* cannot sell the office and emoluments of *paricharaka* inasmuch as they are *extra commercium*.³ The sale of religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office is illegal. Objection can be taken in second appeal.⁴ It has been held in *In re Mirams*, [1891] 1 Q.B. 594, that an assignment of the salary of the chaplain to a workhouse and workhouse infirmary is not void as being against public policy. Lands held on *swastivachakam* service tenure are not subject to attachment in execution of a decree as the sale of such lands is opposed to public policy and the nature of the interest affected.⁵ Hereditary offices, whether religious or secular, though treated by the Hindu text-writers as indivisible are considered by modern custom as alienable in certain circumstances.⁶ Where the parties intended that a sum of Rs. 75 should be paid to the plaintiff per month in lieu of the fact that the plaintiff withdrew his candidature for the office of *sajjadanashin* and *mutwali* or the *khankah* the contract was held an illegal contract within the meaning of Section 23 and therefore unenforceable. There is no difference so far as the application of the principle is concerned between a public office and the office of a trustee of the above nature.⁷ The office of *mutwali* is a personal trust and cannot be transferred.⁸

An undertaking to pay money to a public servant, to induce him to retire and thus make way for the appointment of the promisor, is virtually a trafficking with reference to an office and is void under Section 23 of the Contract Act.⁹ An agreement to remunerate a person in order to secure an employment is void on the ground of public policy under Section 23, and

1. *Revashankar v. Velji Jagjiwan*, A.I.R. 1951 Kutch 56.

2. *Venkataramanayya v. Lobo*, A.I.R. 1953 Mad. 506; *Saminatha v. Muthusami*, (1907) 30 Mad. 530.

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4. *Kuppa Gurukul v. Dorasami*, (1883) 6 Mad. 76.

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7. *Nasihuddin v. Salihuddin*, A.I.R. 1957 Patna 659.

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any money paid under such agreement cannot be recovered.¹ An agreement of bargain or traffic relating to a public office is opposed to public policy.²

The sale of a recommendation, nomination or influence in procuring a public office is illegal and void, for trafficking in offices would inevitably tend to official corruption: and the Court will not assist a party who has entered into a contract tainted by moral turpitude, both sides being *particeps criminis in pari delicto*.³ The sale of recommendation for the office of a *karnam* is opposed to public policy.⁴ A promise to pay the salary of a Receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor. A Receiver being an officer of the Court, the Court only is to determine his fees or remuneration; and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority.⁵ An agreement providing for remuneration to be paid to an executor not out of the assets of the testator but from the pocket of a third person is not void.⁶ The taking of an assignment of a mortgage by a *patwari* was not held as a transaction opposed to public policy.⁷ Neither there was any legal prohibition against a *kanungo* purchasing mortgaged property.⁸ The acquisition of property by a Government servant in the name of another even in direct contravention of the departmental rules is not illegal, because Government Servants' Conduct Rule is not based on any statutory provision, but is merely a rule of conduct. Though the conduct of a person might be opposed to public policy the subject-matter of the contract is not necessarily opposed to public policy in the absence of any statutory prohibition.⁹ Any indemnity given to bail whether by the person bailed or another is illegal and cannot be enforced.¹⁰ It has been held in *Lily White v. Munuswami*, A.I.R. 1966 Mad. 13 that a printed condition on the laundry receipt that only half the value of the garment would be refunded in case the garment was lost was unlawful.

The exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality, as well as to public policy.¹¹ Where it appeared that

1. *Ranjeetsingh v. Ramlal*, A.I.R. 1951 M.B. 113.

2. *Puttu Lal v. Raj Narain*, (1931) 53 All. 609.

3. *Ledu Coachman v. Hiralal*, (1916) 43 Cal. 115.

4. *Karuppiiah v. Ponnuchami*, A.I.R. 1933 Mad. 768.

5. *Prokash v. Adlam*, (1903) 30 Cal. 696.

6. *Narayan Coomari v. Sajani Kanta*, (1894) 22 Cal. 14.

7. *Bhagwan Dei v. Murari Lal*, (F.B.), (1917) 39 All. 51 : 36 I.C. 259 over-ruling *Shiam Lal v. Chhaki Lal*, (1900) 22 All. 220 : (1900) A.W.N. 30, and *Sheo Narain v. Mata Prasad*, (1904) 27 All. 73 : I.A.L.J. 412.

8. *Kamala Devi v. Gur Dayal*, (1917) 39 All. 58 : 36 I.C. 319.

9. *Dharwar Bank Ltd. v. Mahomed Hayat*, A.I.R. 1931 Bom. 269 ; *Manuel S. Lobo v. Nicholas Britto*, (1897) 7 M.L.J. 268 ; *Bhagwan Dei v. Murari Lal*, (1917) 39 All. 51 : 36 I.C. 259 ; *Kamala Devi v. Gur Dayal*, (1917) 39 All. 58 : 36 I.C. 319 ; *Surasabhalini v. Phanindra* A.I.R. 1965 S.C. 1364.

10. *Meherulla v. Sariatulla*, (1930) 57 Cal. 1093.

11. *Abdul Majeed v. Khirode Chandra*, (1915) 43 Cal. 690.

the applicant was a purchaser of property from the judgement-debtor, that he undertook to pay the debt of the decree-holder and had improperly obstructed and refused to pay the debt, there was no ground of equity to entitle him to enforce the security bond executed under the order of the Court.¹ If a person enters into a contract with a public servant which he knows casts upon the public servant duties which may conflict with the duties he owes to the public, such a contract is void.²

D obtained a contract from the Secretary of State for India in Council to convey postal articles and mail. It was provided that no part of the contract or interest of the contract should be transferred to any other person without the previous consent in writing of the Director-General, Posts and Telegraphs or Postmaster-General. *D* entered, however, into a partnership with *P*. After running the partnership for sometime, it was dissolved and they entered into a contract by which *P* was to run the lorries and *D* would get the contract transferred to *P* and the lorries were also to be transferred to *P*. If, however, *P* failed to obtain the contract for the post, *D* was to maintain the continuance of the said contract, and the running of the motor lorries. In the circumstances it was held that it was not intended that ownership by *P* should be divorced from control, or that *P* intended to divest himself of possession of the lorries over which he had obtained the title. For example, he did not hire the lorries to *D*. An agreement of this nature, where when *P* failed to obtain the contract from the post office he was to be in control owing to his ownership, was likely to lead to a condition of affairs which would seriously interfere with the proper maintainance of a service vital and necessary to the public. Moreover, such an agreement involved deceit of the Secretary of State in respect of a matter in which the public as a whole were vitally interested; the contract was therefore opposed to public policy and therefore void under Section 23.³

If the parties to an agreement for a knock-out come to the Court for an injunction to restrain one of their members from bidding at the auction contrary to his agreement, the Court will refuse to grant the injunction. The Court will refuse it because the agreement is contrary to public policy, as restraint of trade contrary to the interests of the public. Neither will the Court take an account of the profits resulting from a knock-out for the same reason. The combination of a ring may not give a cause of action to the plaintiff it drives out of trade, but may be nonetheless unenforceable as being contrary to public policy as in restraint of trade. Thus such a contract may be unenforceable though it may be neither criminal or actionable.⁴ An agreement by the intending bidders at an auction forming a ring to share the profits

1. *Kummakutty v. Neelakandan*, (1930) 53 Mad. 943.

2. *Sisarampur Coal Co., Ltd. v. Colley*, (1908-09) 13 C.W.N. 59.

3. *Bhural Ramkaran v. Goduram Mangalchand*, A.I.R. 1943 Nag. 260.

4. *Mogul Steamship Co. v. McGregor*, [1892] A.C. 25 : 61 L.J.Q.B. 295 : 66 L.T. 1 ; 56 J.P. 101 ; 40 W.R. 337.

resulting from the knock-out is against public policy.¹ On the other hand there are decisions holding that there is nothing necessarily unlawful in two or more persons agreeing not to bid against each other at an auction sale.² No fraud is necessarily constituted through deterring others from bidding for the same property.³

An agreement between several persons not to bid against each other and to buy the property in partnership is not opposed to public policy.⁴ An agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy. But where such agreement is not merely a case of an honest combination between two bidders to purchase the property at an advantageous price but goes further by resorting to a secret artifice for the purpose of defrauding a third person, *e. g.*, a rival decree-holder, it is void as its object is fraudulent and unlawful.⁵

According to this latter view an agreement not to bid against each other in an auction is not illegal in India. According to this view, such an agreement is not invalid on the ground of public policy and does not vitiate the auction sale.⁶ *A* and *B* made tenders to postal authorities to secure a licence to carry mails between certain places. There was an agreement between *A* and *B* by which *A* was to withdraw his tender and in consideration of the withdrawal *B* agreed to pay *A* a certain monthly sum. *A* withdrew his tender and the licence was given to *B*. In a suit by *A* to recover the sum on the basis of the agreement, it was held that the agreement for the withdrawal of the tender which was in the nature of an offer or bid, was like an agreement between intending bidders that one should keep off from bidding and was not unlawful or opposed to public policy under Section 23. The obtaining of a licence from Government is not in the nature of a trade or calling and therefore the instant agreement was not invalid under Section 27.⁷ It will be submitted that this last-mentioned view upholding the transactions in question appears to smack of laissez-faire, and as the list of the heads of public policy is never closed, the Courts in later decisions may well apply the doctrine of public policy in furtherance of the general policy of the community.

A transaction which seeks to bye-pass or contravene a control legislation

1. *Parduman Chand v. Kashmira Singh*, A.I.R. 1943 Lah. 100.
2. *Hari Balakrishna v. Naro Moreswar*, (1894) 18 Bom. 342; *Jai Ram v. Kahna Ram*, A.I.R. 1963 Him. 3.
3. *Doorga Singh v. Sheo Pershad*, (1889) 16 Cal. 194.
4. *Nand v. Bhagat Singh*, A.I.R. 1932 Lah. 32; *Govid v. Sherajunnissa*, (1883) 13 Cal. L.R. 1; *Doorga Singh v. Sheo Pershad*, (1889) 16 Cal. 194; *Mira Ravuther v. Savvasi Vijaya*, (1900) 23 Mad. 227 P.C.; 27 I.A. 17 P.C.; 37 P.R. 1901; 97 P.L.R. 1901 relied on.
5. *Ram Lal v. Rajendra*, A.I.R. 1933 Oudh 124.
6. *Ramalingaiah v. Subbarami*, A.I.R. 1951 Mad. 390; *Mahomed Mira Ravuther v. Savvasi Vijaya Raghunandha*, 23 Mad. 227 P.C.; 27 I.A. 17 P.C.; *Mohamed Isack v. Sreeramalu*, (1946) 1 M.L.J. 187; A.I.R. 1946 Mad. 289; *Hari Balakrishna v. Moreswar*, 18 Bom. 342.
7. *Isack v. Sreeramalu*, A.I.R. 1946 Mad. 289.

cannot be favourably regarded by the Court, and an agent who undertakes to put it through will deserve no encouragement. The contract of agency in such a case is vitiated by Section 23 of the Contract Act as its object is the abetment of a criminal offence.¹

Plaintiff agreed to sell and the defendant agreed to buy a certain quantity of jute bales at prices mentioned. Port of delivery was Genoa, Italy. Seller could not export jute without first obtaining a quota and a licence from the Government. The contract did not, however, make the obtaining of quota and licence from the Government a condition precedent for the contract. The seller did not export the bales as required by the contract. The arbitrator to whom the question of the breach and the damages therefor were referred, came to the conclusion that there was no implied term that the contract was subject to the condition precedent of obtaining quota and licence from the Government. Neither the agreement nor the award as such was against the public policy of India.²

Where the *darkhast* grant was in the nature of a gift by the Government with a specific provision that the property shall not be alienated without the consent of the *tahsildar* the grant was a personal grant to the grantee, and any contract which has the effect of circumventing this policy of the Government would be opposed to public policy and therefore void. Where the plaintiff in apprehension that if he himself applied, he would not be granted a site by the Government and therefore set up someone else to apply for the site with the intention of appropriating the same to himself, it amounted to playing a fraud on the Government and the transaction being void the plaintiff could not succeed in getting back the site on the ground that it was a *benami* transaction.³

The Government of India by Ordinance prohibited the taking out of British India of goods which were destined for any port or place in the Union of South Africa or which were intended to be taken to the Union although destined for a port or place outside it. The respondents agreed to sell and deliver to the appellant a quantity of jute bags c.i.f. Genoa. To the knowledge of both parties to the contract the goods were to be supplied from India and were to be made available in Genoa so that they might be re-sold to the South African buying agency contrary to the Ordinance. The proper law of the contract was English law. The respondents did not deliver the jute bags and the appellant brought an action for damages for breach of contract. It was held that the contract would not be enforced in England as a matter of public policy, because its performance would have involved, as the parties to it knew, doing in a foreign and friendly country

1. *Karamchand v. Parekh Lauji*, A.I.R. 1951 Kutch 50.

2. *Pratabmull v. Sethia*, A.I.R. 1960 Cal. 702.

3. *Ganesa v. Arumugha*, A.I.R. 1954 Mad. 811.

an act which would have violated a law of that country.¹

Procedural requirements.—The Government of India Act, 1915, as subsequently amended,² the Government of India Act, 1935,³ the Constitution of India⁴ as well as various other statutes made or make some contracts subject to special procedural requirements. Any non-compliance with the necessary procedural requirements renders the agreements in question void, that is, unenforceable.⁵ By a vast consensus of judicial opinions, the agreements in question, when thus rendered void, attract the application of Section 65 of the Contract Act. See under Section 11, *Government, ante*. See also Section 65, *post*.

Void Agreements

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Agreements void if considerations and objects unlawful in part.

Illustration

A promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of 10,000 rupees a year. The agreement is void, the object of *A*'s promise and the consideration for *B*'s promise being in part unlawful.

Consideration partly unlawful.—An agreement may have one or more objects in its view. An agreement may be based on one or more considerations. There may be cases where there is only one single consideration for the several objects in view. Or, there may be several considerations for the sole object of the agreement. There may also be cases of agreements based on several considerations and having several objects in view. Section 24 says that if any agreement based on a single consideration has one or more objects in its view and a part of the said single consideration is unlawful, the agreement will be void, that is, unenforceable. The Section also says that when an agreement has got only one sole object in its view but is based on a number of considerations and any one of the several considerations or even a part of any one of the several considerations is unlawful, the agreement will be void. *A* promises to superintend, on behalf of *B*, a legal manufacture of indigo, and an illegal traffic in other articles. *B* promises to pay to *A* a salary of Rs. 10,000 a year. The agreement is void, the object of *A*'s promise and the

1. *Regazzoni v. K. C. Sethia, (1944) Ltd.*, [1957] 3 All E.R. 286 H.L.; *Foster v. Driscoll*, [1929] 1 K.B. 470; *Ralli Brothers v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 approved. As to effect of war on obligations see also *Motishaw & Co. v. Mercantile Bank of India*, (1917) 41 Bom. 566.

2. S. 30, *ibid*.

3. S. 175, *ibid*.

4. Article 299, *ibid*.

5. *Chatturbhuj v. Moreshwar*, [1954] S.C.R. 817, 835; A.I.R. 1954 S.C. 236; *Damodar v. Union of India*, A.I.R. 1956 Cal. 526; *Wright and Son, Ltd. v. Romford Corporation*, [1956] 3 All E.R. 785; *Chairman, South Barrackpore Municipality v. Amulya Nath*, (1907) 94 Cal. 1030.

consideration for *B*'s promise being in part unlawful.

It will be observed that the marginal notes to Section 24 as well as the illustration thereto seem to imply that an agreement will be void not only when even a part of its consideration is unlawful but also when even a part of its object or objects is unlawful. The wordings of the Section are however silent on the point of an agreement being void even when a part of the object or objects thereof is unlawful. The enactment of the Section 24 has been thus less extensive than the marginal notes and the illustration thereto. The whole has been, without justification, smaller than the patch. Moreover, what about the case of an agreement which has got (i) several considerations as its bases, and (ii) several objects as its aim, and when (iii) some of the considerations are lawful and some not, and (iv) some of the objects are lawful and some not, and where (v) the several considerations are severable enabling the court to link one particular consideration or a group of considerations to one or more of the several objects of the agreement? This leads to the question of severability of a void or illegal contract for which see below.

Severability of illegal provisions.—Where a contract is not fundamentally objectionable and some of its provisions are severable from the rest, the law may extend its sanction in favour of the innocent provisions. Where the illegality is criminal or *contra bonos mores* and is an ingredient in the contract, the whole contract is invalidated, although there may be many other provisions in it. A contract containing a number of provisions, some lawful, others unlawful, may be severed provided (i) that it does not involve the commission of a crime, immorality, or other reprehensible conduct, and (ii) that the promise sought to be severed and thus ignored does not constitute the main part of the consideration for the contract.¹ Only where the illegality is not criminal, and some of the terms of the contract can be allowed to stand, the illegal portion will be severed. Only the illegal portion of the contract will then not be enforced by the court on grounds of public policy.² Thus where a contract has been made for the sale of a business and the said contract contains a provision restricting the vendor from competing in or engaging in trade for a certain period or within a certain area, the contract for the sale will not be impugned though the provision restricting competition may be, in England, in given circumstances regarded as being in restraint of trade and therefore contrary to public policy. There may also be cases where not only the main contract will be left standing but part of the provision restricting competition may also be allowed to stand. As to the Indian law regarding restraint of trade see Section 27, *post*.

Contracts seeking to exclude the jurisdiction of a court of law or made in

1. *Bennett v. Bennett*, [1952] 1 K.B. 249; [1952] 1 All E.R. 413.

2. *Goodison v. Goodison*, [1954] 2 Q.B. 118; [1954] 2 All E.R. 255; *Babasaheb v. Rajaram*, A.I.R. 1931 Bom. 264; *Sadagopa Ramanjiah v. Mackenzie*, (1892) 15 Mad. 79; *Parasullah v. Chandra Kant*, (1917) 21 C.W.N. 979; 39 I.C. 177; *Asaram v. Ludheshwar* (F.B.), A.I.R. 1938 Nag. 335; *Rosenthal & Sons v. Esmail*, [1965] 2 All E.R. 860 H.L.

restraint of trade are not contracts which are fundamentally illegal. They are simply void, that is unenforceable in a court of law. For the Indian law on the subjects *see* Sections 27 and 28 respectively, *post*. A court of law in England does not as a rule of public policy lend its assistance in the enforcement of contracts seeking to exclude the jurisdiction of a court of law or made in restraint of trade. Public policy also may require the court to lend its assistance in the enforcement of some of the covenants in an agreement if such covenants do not militate against the principle of reasonableness or public interest. If therefore a party enters into several covenants some of which cannot be, on grounds of public policy, enforced against him, he may not be released, if public policy so demands, from performing the others.¹ To give efficacy to this principle, lawful promises may be allowed to be severed from the unlawful for the purpose of their enforcement.² When however the different promises are not independent and severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, no part can be severed from the rest or enforced.³ When a contract is essentially or fundamentally illegal, severance is not allowed. Thus, if one of the promises is to do an act which is either in itself a criminal offence or *contra bonos mores* the court will regard the whole contract as void.⁴

Where the contracts in question are not fundamentally illegal, money paid, property transferred, or goods delivered in pursuance of such contracts can be recovered.⁵ The transactions being objectionable on grounds of public policy, relief may be given to the parties on the same ground.⁶

Where money was advanced to a married woman partly in order to enable her to secure a divorce from her husband and partly to purchase ornaments and then to marry the man who had advanced the money and the woman did not marry him, the money was entirely irrecoverable.⁷ Money advanced for a partnership which is partly illegal is irrecoverable.⁸ An agreement for rent tainted with illegality is not enforceable.⁹ Where an agreement in violation of Section 257A of the Code of Civil Procedure was only inoperative and not fundamentally illegal and a party to such agreement had already availed himself of the consideration, relief was given to the other party on

1. *Wallis v. Day*, (1837), 2 M. & W. 273, 280; *In re Prudential Assurance Co.'s Trust Deed*, [1934] Ch. 338; *Bennett v. Bennett*, [1952] 1 K.B. 249; [1952] 1 All E.R. 413, *Goodison v. Goodison*, [1954] 2 Q.B. 118; [1954] 2 All E.R. 255.

2. *Goodison v. Goodison*, [1954] 2 Q.B. 118; [1954] 2 All E.R. 255.

3. *Attwood v. Lamont*, [1920] 3 K.B. 571, 578; *Goldsoll v. Goldman*, [1915] 1 Ch. 292.

4. *Bennett v. Bennett*, [1952] 1 K.B. 249, 253; [1952] 1 All E.R. 413, 416; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515; [1955] 1 All E.R. 46; *Mt. Roshun v. Muhammad*, (1887) *Punj. Rec.* 46; *Bai Vijli v. Nansa Nagar*, (1885) 10 *Bom.* 152.

5. *Wyat v. Kreglinger and Fernan*, [1933] 1 K. B. 793, 317.

6. *Vauxhall Bridge Co. v. Spencer* (1821), *Jac.* 64; *Hermant v. Charlesworth*, [1905] 2 K. B. 123; *Goldsmith v. Bruning* (1700), 1 *Eq. Cas. Abr.* 89.

7. *Mussammat Roshun v. Muhammad*, (1887) *Punj. Rec.* 46; *Bai Vijli v. Nansa Nagar*, (1885) 10 *Bom.* 152.

8. *Gopalrav v. Kallappa*, (1901) 3 *Bom. L.R.* 164.

9. *Laxmanlal v. Mulshankar*, (1908) 32 *Bom.* 449.

the ground of public policy,¹ but where the object was fundamentally illegal the agreement was held wholly void.²

Under Section 4 of the Indian Trusts Act, 1882, every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and other unlawful, and the two purposes cannot be separated, the whole trust is void. When a transaction is no longer a mere contract but has taken the shape of a conveyance, it will be governed by the provisions of the Transfer of Property Act, 1882.³ An agreement for the payment of enhanced rent in violation of the Bengal Tenancy Act, 1885, was held void *in toto* and not valid for so much of the enhanced rent as would be legally allowed under the Act.⁴

Where the sale of a village share and the surrender of exproprietary rights in *sir* appertaining to that share form part of the same transaction but are evidenced by separate deeds and the consideration for each transaction is separately mentioned and there is no plea that the consideration mentioned in the sale deed in respect of the village share did not in fact represent the value paid for that share, it ought to be held that the sums mentioned in the two deeds represented the consideration for the transactions and although the surrender is void and unenforceable, the sale of the village share, if in other respects valid, cannot be avoided and declared illegal.⁵

If there is one entire consideration for two several contracts and one of these contracts is for the performance of an illegal act, the whole contract is void. Thus, where one sum is to be paid for the doing of a legal and an illegal act, the whole contract is void. And if a contract or promise be founded upon a legal and an illegal consideration and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of the part vitiates the whole.⁶

If a contract be made on several considerations one of which is illegal, the whole contract is void whether the illegality be at common law or by statute.⁷ Part of a single consideration for one object being unlawful, the whole agreement is void under Section 24.⁸

If part of the consideration is illegal and the promise is not divisible and apportionable to the several parts, the whole contract is void. A contract for the hiring of a housekeeper made partly in consideration of illicit cohabi-

1. *Bank of Bengal v. Vyabhoj Gangji*, (1891) 16 Bom. 618.

2. *Davlatasing v. Pandu*, (1885) 9 Bom. 176.

3. *Dip Narain v. Nageshar*, (F.B.), (1929) 52 All. 338, 340; 122 I.C. 872; A.I.R. 1930 All. 1; *Gappoo v. Har Charan*, A.I.R. 1935 Oudh 501; 158 I.C. 267.

4. *Kristodhone v. Brojo Gobindo*, (1897) 24 Cal. 895; *Pickering v. Ilfracombe Ry.*, L.R. 3 C.P. 235, 250; *Baker v. Hedgercock*, 39 Ch. D. 520.

5. *Dharamchand v. Jhamsa*, A.I.R. 1931 Nagpur 6; 130 I.C. 91.

6. *Ramaswamy v. Nachiappa*, A.I.R. 1940 Rang. 45; 186 I.C. 709; *Saundatti Yellama Municipality v. Shripadhat*, A.I.R. 1933 Bom. 132.

7. *Joseph v. Solano*, (1872) 9 B.L.R. 441; *Balgovind v. Bhaggumal*, (1913) 35 All. 558; 21 I.C. 878; *Alice Mary Hill v. William Clarke*, (1905) 27 All. 266.

8. *Laxmanlal v. Mulshankar*, (1908) 32 Bom. 449.

tation is void.¹ An agreement with a lawyer to pay a fee in cash as well as to give a part of the property in dispute in case he wins the suit is void *in toto*.²

A mortgage was executed by the first respondent for the sum of Rs. 2,400 misappropriated by his son the third respondent and as a compromise for the police prosecution pending against the latter. The prosecution then pending was for a non-compoundable offence under Section 408 of the Indian Penal Code. On the day after the mortgage the Managing Director of the claimant Bank wrote to the police not to proceed with the prosecution and the case was eventually thrown out under Section 253(2) of the Criminal Procedure Code for failure of the prosecution to adduce evidence in support of the case. The mortgage was held void under Section 24 of the Contract Act.³ As it has been held in *Ouseph Poulo v. Catholic Union Bank Ltd.*, A.I.R. 1965 S.C. 166, the party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution.

Even where the object of the parties is unlawful in part, the compromise embodying such an object will be affected by Section 23, and no decree can be passed in terms of such a compromise. Thus, where the object of the compromise between the first and third respondents was intended to injure the rights of the petitioner, a third person, in the suit property and was thus fraudulent, no decree could be passed in terms of the said compromise.⁴ In *Harishanker v. Bishwanath*, A.I.R. 1965 Patna 33, the compromise was not an agreement causing injury to the property of another. Where an agreement is partly lawful and partly illegal, the public policy of the law may persuade the Court to enforce, with modifications, if necessary, the portion that is legal.⁵

Where a part of the consideration of an agreement consisted in the withdrawal of a criminal prosecution, the agreement was void.⁶ Where a contract was *ultra vires* of the power of a Municipality, it was void.⁷

Where a partnership got an object or a basis in partial violation of the Electricity Act it was held void *in toto*.⁸ Where a mortgage was only inoperative and not illegal under an Act, a collateral personal covenant to repay

1. *Alice Mary Hill v. William Clarke*, (1905) 27 All. 266; *Saundatti Yellama Municipality v. Shripadhat Seshbhat*, (1932) 57 Bom. 278; A.I.R. 1933 Bom. 132; 35 Bom. L.R. 163; 143 I.C. 331.

2. *Kathu Jairam v. Vishwanath Ganesh*, (1925) 49 Bom. 619; 89 I.C. 199. See also under S. 181, in vol. 2.

3. *Eastern Mercantile Bank Ltd. v. Philip*, A.I.R. 1960 Kerala 194.

4. *Narasimha Raju v. Yellamanda*, A.I.R. 1960 Andhra 32.

5. *Poonoo Bibee v. Fyez Buksh*, (1875) 15 B.L.R. Appendix, 5.

6. *Nandkishore v. International Mercantile Corporation*, A.I.R. 1953 Cal. 415; *Bani Ramchandra v. Jayawanti*, (1918) 42 Bom. 339; 45 I.C. 566; *Bindeshari Prasad v. Lekhray Sahu*, (1916) 1 Pat. L.J. 48, 60; 33 I.C. 711; *Srirangachariar v. Ramasami*, (1894) 18 Mad. 189; see also under head, *Stifling prosecutions*, Section 23, ante.

7. *Saundatti Yellama Municipality v. Shripadhat Seshbhat*, (1932) 57 Bom. 278; A.I.R. 1933 Bom. 132; 35 Bom. L.R. 163; 143 I.C. 331.

8. *Ma Kyin Hone v. Ong Boon Hock*, A.I.R. 1937 Rang. 47; 167 I.C. 707; for further illustrations see under Section 23; head, *Miscellaneous cases of public policy*.

the amount was held enforceable.¹ Where in a mortgage bond two considerations were stated, one of which was valuable and was separable from the other, effect could be given to the instrument to the extent of the amount of the consideration that was valuable, and to that extent the transaction could not be regarded as fraudulent.²

If a contract contains distinct covenants some of which are legal and others illegal, the fact that some are illegal will not make the legal ones unlawful and the Court can enforce the legal ones. If the effect of enforcing a contract would necessarily be to defeat the provisions of any law, the contract would undoubtedly be void, but if it consists of several distinct parts which can be separated, the whole transaction would not be bad unless the provisions of Section 24 of the Contract Act are applicable to it.³ When the right to enter into a contract was partly beyond competence of the promisor and partly not so, the part within competence can be enforced.⁴

Where the illegal part cannot be severed from the legal part of a covenant, the contract is altogether void; but where they can be so severed, whether the illegality be created by statute or by common law, the bad part may be rejected and the good retained.⁵ A man is not the less bound by a legal contract because he has at the same time made a contract which is illegal, the only question in each case being the question whether the legal and the illegal can be severed.⁶

When there is an entire contract and part of it cannot be enforced, the whole goes, though it is otherwise when an instrument contains two or more distinct contracts which are severable.⁷ Where the two parts could not be separated, the whole agreement was void.⁸

Where the consideration for a mortgage was unlawful under Section 24 of the Contract Act, and it failed *ab initio*, the claim for repayment of the money advanced to the mortgagor as money had and received being brought more than three years after the date of the mortgage deed was barred by reason of Article 62 of the Limitation Act, 1908.⁹

1. *Gauri Datt v. Bandhu*, A.I.R. 1929 All 394 : 119 I.C. 505 ; *Bhagwat v. Hari Kishen*, (1942) 197 I.C. 167 : A.I.R. 1942 Oudh 1 ; *Md. Khalilur Rahman v. Muzammilullah*, 144 I.C. 873 : 1933 A.L.J. 1522 : A.I.R. 1933 All. 468.

2. *Rajani Kumar v. Gaur Kishore*, (1908) 35 Cal. 1051.

3. *Raja of Cochin v. Kintunni* (F.B.), A.I.R. 1917 Mad. 162 ; *Meherally v. Sakerkhanoobai*, (1905) 7 Bom. L.R. 602 ; *Bhagwat Singh v. Hari Kishen*, A.I.R. 1942 Oudh 1 ; *Dip Narain v. Nageshar* (F.B.), 52 All. 338 : A.I.R. 1930 All. 1 : 1930 A.L.J. 45 ; *Parashram v. Sitaram*, A.I.R. 1924 Nagpur 84 : 78 I.C. 357 : 20 N.L.R. 1 ; *Poono Bibee v. Fyez Buksh*, (1875) 15 Beng. L.R. Appendix 5.

4. *Dip Narain v. Nageshar* (F.B.), A.I.R. 1930 All. 1.

5. *Pickering v. Ilfracombe Railway* (1868), 3 C. P. 235, 250 : 37 L.J.C.P. 118 ; 17 L.T. 650 : 16 W.R. 458 ; *Meherally v. Sakerkhanoobai*, (1905) 7 Bom. L.R. 602.

6. *Nordenfeli Co. v. Maxim*, [1894] A.C. 535 : 63 L.J. Ch. 908 : 71 L.T. 489.

7. *Pothi Naicken v. Nagama Naicken* (F.B.), A.I.R. 1917 Mad. 77 ; *Davlatling v. Pandu*, (1885) 9 Bom. 176.

8. *Khushal v. Labhan Rao*, A.I.R. 1928 Mad. 232 ; *Davlatling v. Pandu*, (1885) 9 Bom. 176.

9. *Bai Diwali v. Jiwabhai Kalidas*, (1916) 40 Bom. 614. Art. 24, Limitation Act, 1963.

The question whether a sale and a subsequent agreement are integral parts of a single transaction connected and interdependent or whether they are separate and independent of each other is one of fact and not law.¹ The terms of a contract may help the Court².

Where a *pardanashin* lady does not understand an important feature of a transaction affecting in a high degree the expediency of her entering into it, the bargain cannot be divided into parts or otherwise reformed by the Court so as to uphold a certain portion of it while rejecting others.³

25. An agreement made without consideration is void un-

Agreement without less—
consideration void,

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other, or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent general-ly or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this Section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

- (a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.
(b) A, for natural love and affection, promises to give his son B Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

1. *Shree Ram v. Ratanlal*, A.I.R. 1965 All. 83.

2. *Union of India v. Cold Storage & Refrigeration Co. Ltd.*, A.I.R. 1965 Punj. 25.

3. *Hem Chandra v. Suradhuni*, (1940) 2 Cal. 436 P.C. : A.I.R. 1940 P.C. 134.

(c) *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract.
 (d) *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract.

(e) *A* owes *B* Rs. 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B* Rs. 500 on account of the debt. This is a contract.

(f) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A*'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) *A* agrees to sell a horse worth Rs. 1,000 for Rs. 10. *A* denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not *A*'s consent was freely given.

Agreements without consideration.—An agreement made without consideration is void, that is, unenforceable, except in certain given cases.¹ *A* promises, for no consideration, to give to *B* Rs. 1,000. This is a void agreement. Section 25 specifies the cases where an agreement though made without a consideration will be valid, that is, enforceable. Where natural love and affection is the factor that prompts a person to make a contract the question of consideration is not material for making the contract enforceable provided however the required formalities are observed in the formation of the contract in question. In certain cases an act done for a person though not with a view to securing a promise from him may be compensated by him by a promise, and such promise will be binding on him though there was no consideration moving from the promisee at the desire of the promisor, and the act done for him was a past one. Time-barred debts may also be treated as a consideration for an agreement signed by the person to be charged therewith or by his agent. All these cases of exception have been hereinafter treated under distinct heads.

As to the concept, importance, sufficiency, and illustrations of consideration see under Section 2(d), *ante*. A few cases are however hereinafter cited by way of addition, and with special reference to Section 25.

Where the manager of a joint Hindu family promises to make certain donations to certain charitable institutions and actually pays them after the date of severance in status of the joint family, he cannot claim any contribution from the other members of the family in respect of it. As the liability could not be enforced against the manager himself it cannot be considered to be a legal family debt.²

Unless an agreement is saved by the exceptions as given in Section 25, consideration is indispensable, and registration of the sale-deed or mortgage in the absence of consideration will not render the transaction enforceable.³

1. *Indran Ramaswami v. Anthappa*, (1906) 16 M.L.J. 422, 426; *Gopal Saran v. Sita Devi*, A.I.R. 1932 P.C. 34; 36 C.W.N. 392; 34 Bom. L.R. 470; 135 I.C. 753.

2. *Gopal Vinayak v. Trimbak Narayan*, A.I.R. 1953 Nag. 195; *Dorawamy v. Arunachala*, 159 I.C. 345; A.I.R. 1936 Mad. 135; *Jamuna Das v. Ram Kumar*, 169 I.C. 396; A.I.R. 1937 Pat. 358; *Adaitya Dass v. Prem Chand*, 120 I.C. 105; A.I.R. 1929 Cal. 369; *Abdul Aziz v. Masum Ali*, A.I.R. 1914 All. 22 relied on.

3. *Manna Lal v. Bank of Bengal*, (1876) 1 All. 309; *Tatia v. Babaji*, (1896) 22 Bom. 176. 181, 182.

In *Bai Hiradevi v. Official Assignee of Bombay*, A.I.R. 1955 Bom. 122, 126, it was observed by Chagla, C. J., that a disposition of property brought about by transfer is not a contract and that the relevant Section which deals with gift is not Section 25 of the Contract Act but Section 122 of the Transfer of Property Act which permits a transfer of property without consideration provided the requirements of Section 123 are complied with. This observation of his lordship was quite uncalled for in that there is no conflict between Section 25 of the Contract Act and Section 122 of the Transfer of Property Act. Transfers of immovable property other than gifts require consideration for their validity subject of course to the exceptions as laid down in Section 25 of the Contract Act.

In a suit brought for recovery of money on an account stated, it is open to a defendant to say that the account stated was completely without consideration, and therefore void, and that no decree could be passed on the basis thereof.¹

Where a newly admitted partner along with the existing partners acknowledges that on a particular day a particular amount is due from the partnership to their creditor, there is sufficient consideration for the newly admitted partner's undertaking to pay the acknowledged debt. The acknowledgment thus creates a new contract as the admitted partner obtains the promise of a partnership as the condition of his liability. Novation may constitute a good consideration for a fresh promise.²

Where a consideration is deemed to be opposed to public policy and therefore unlawful, any agreement on the basis of such consideration will be void.³ Judges may however differ as among themselves as to whether a given fact-situation will attract the application of the public policy of the law, for which see under the head, *Opposed to public policy*, Section 23, *ante*.

The giving up of a right or a forbearance to exercise it is a good consideration.⁴ The giving up of a *bona fide* claim to a property forming the subject of an agreement of compromise is a good consideration.⁵ If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value.⁶ Where

1. *Ran Bahadur v. Hanuwant*, A.I.R. 1957 Raj. 29.

2. *Gouri Dutt v. Madho Prasad*, A.I.R. 1943 P.C. 147.

3. *Bai Fatma v. Alimahomed*, (1912) 37 Bom. 280; *Meherally v. Sakerkhanoobai*, (1905) Bom. L.R. 602; *Hill v. William Hill*, [1949] A.C. 530.

4. *Bank of New India, Ltd. v. Govinda*, A.I.R. 1964 Ker. 267.

5. *Vathiyam Balarama v. Vavilala Vasudeva*, A.I.R. 1948 P.C. 7; (1948) 1 M.L.J. 47; *Indira Bai v. Mdkarand*, A.I.R. 1931 Nag. 197; *Jagadindra v. Chandra*, (1903) 31 Cal. 242.

6. *Miles v. New Zealand Alford Estate Co.*, (1886) 36 Ch. D. 266, 291; *Wilby v. Elgee* (1875), L.R. 10 C.P. 497; *Radha Rani v. Ram Dass*, A.I.R. 1941 Patna 282; *Rameshar v. Babulal*, A.I.R. 1946 Pat. 97; 225 I.C. 629; *Ayaram v. Sadhu Lal*, A.I.R. 1938 Lah. 781; *Jagaveera Rama Ettappa v. Arumugam*, (1918) 45 I.A. 195, 203; 48 I.C. 907; *Rallu v. Phalla*, (1919) P.R. 137; 53 I.C. 497; *Gopal Sahai v. Dhani Ram*, 118 I.C. 646; A.I.R. 1929 Lah. 689; *Olai Pulliah v. Varadarajulu*, (1908) 31 Mad. 474, 476, 477; *Krishna v. Hemaja*, 45 I.C. 477; (1917) 22 C.W.N. 463; *Dadabhoy v. Pestonji*, (1893) 17 Bom. 457, 465; *Bhima v. Ningappa*, (1868) 5

there is no forbearance or undertaking at all there is no consideration.¹

A person by doing an act or by promising to do an act which he was in law required to do cannot constitute a consideration in order to base a fresh promise thereon.² When however a person does an act which he was required in law to do but does it in a particular manner or at a particular time or does something in addition to the legal duty at the desire of another, it will be a good consideration for a fresh promise.³ Where a person is not required in law to do a thing but does it at the desire of another person and the latter promises to pay him, the promise is for consideration and therefore valid.⁴ Where a person seeks to make a decree the consideration for a bond but that decree was made by a Court having no jurisdiction, the bond will be baseless and therefore unenforceable.⁵

Inadequate consideration.—An agreement made without consideration is void except in certain given cases. Explanation 2 to Section 25 makes it clear that though consideration is indispensable, except in certain given cases, for the formation of a binding agreement, its adequacy is not. Where in an agreement the consent of the promisor has been freely given, an inadequacy of the consideration will not render it unenforceable. While under Section 2(d), it has been seen that under the English common law of contract, a distinction is made between insufficiency of consideration and its inadequacy. It has also been seen that while sufficiency of consideration is indispensable for the formation of a valid contract, its adequacy is not. Explanation 2 of Section 25 of the Indian Contract Act however entitles the Court to take the fact of inadequacy of consideration into account while determining the question whether the consent of the promisor was freely given. A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is enforceable notwithstanding the inadequacy of the consideration.

A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether

B.H.C., A.C.J. 75; *Callisher v. Bischoffsheim*, (1870) L.R. 5 Q.B. 449; *Girijanund v. Sailajanund*, (1896) 23 Cal. 645, 665, 666; *Bhiwa Mahadshet v. Shivaram Mahadshet*, (1899) 1 Bom. L.R. 495, 497; *Rameshwar v. Lachmi*, (1904) 31 Cal. 111, 131, 132; *Anantanarayana v. Savithri*; (1913) 36 Mad. 151; *Ramkirpal v. Gaye Det*, (1914) 2 All. L.J. 331; *Sunder Singh v. Haro*, (1929) 116 I.C. 719; *Sidh Gopal v. Bihari Lal*, (1928) 50 All. 284; 107 I.C. 247; A.I.R. 1928 All. 65; *Latif Jahan v. Mohamed Nabi*, 137 I.C. 231; 1932 All. L.J. 9; A.I.R. 1932 All. 174; *Kirtyanand v. Ramanand*, 164 I.C. 220; A.I.R. 1936 Pat. 456; *U. P. Govt. v. Church Missionary*, (1947) 22 Luck. 93; 229 I.C. 421; A.I.R. 1948 Oudh 54.

1. *Manna Lal v. Bank of Bengal*, (1876) 1 All. 309.

2. *Sashannah v. Ramasamy*, (1868) 4 M.H.C. 7; *Ram Chandra v. Kalu Raju*, (1877) 2 Bom. 362; *Ganga Ram v. Devi Das*, (1907) Punj. Rec. 61.

3. *Glasbrook Bros., Ltd. v. Glamorgan County Council*, [1925] A.C. 270 H.L.; *Hartley v. Ponsonby* (1857), 7 E. and B. 872; 110 R.R. 867; *England v. Davidson* (1840), 11 A. and E. 856; 52 R.R. 522.

4. *Narayan v. Shajani*, (1894) 22 Cal. 14.

5. *Banda Ali v. Banspat Singh*, (1882) 4 All. 352.

or not *A*'s consent was freely given. Adequacy of consideration when material at law, is a question for the Court.¹

Inadequacy of the price is not itself sufficient to invalidate a transaction.² Want of adequate consideration would not of itself affect the title of the vendee. The party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as would involve the conclusion that he either did not understand what he was about or was the victim of some imposition.³ Where the transaction is a real one, it cannot be impugned by a party on the ground that he parted with valuable property for a most inadequate consideration. In England, only in case of gross inadequacy of consideration equity will intervene. To invoke equity, the inadequacy must be such as to involve the conclusion that the party either did not understand what he was doing or was defrauded.⁴ In India, too, the law is the same.⁵ Mere inadequacy of consideration is not a sufficient ground for setting aside a contract or refusing to decree a specific performance of it. Inadequacy of consideration when it is so great as to amount to evidence of fraud or when it is found in conjunction with any other such circumstance as suppression of the value of the property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts or refuse to decree specific performance of them.⁶ See also Sections 9, 18 and 20 of the Specific Relief Act, 1963, and Section 53 of the Transfer of Property Act, 1882. See *Unconscionable bargains*, under Section 16, *ante*.

Agreements made for natural love and affection.—An agreement though made without consideration will be valid if it is made on account of natural love and affection between parties standing in near relation to each other and is expressed in writing and is registered under the law for the time being in force for the registration of documents.

A for natural love and affection promises to give his son *B* Rs. 1,000. *A* puts his promise to *B* into writing and registers it. This is a contract, that is, an enforceable agreement.

Under Section 25(1), an agreement without consideration will be valid only when it is (i) made on account of natural love and affection, (ii) between parties standing in a near relation to each other, and is (iii) expressed in writing and registered. For Section 25(1), all these three require-

1. *Homer v. Ashford* (1825), 3 Bing. 322, 327; *Mallan v. May* (1843), 11 M. and W. 653. 668; *E. Christopher and Co. v. Easing* (1948) 92 S.J. 232.

2. *Guruswami v. Subbarayya*, (1889) 12 Mad. 118.

3. *Deuji v. Karsandas*, A.I.R. 1954 Pat. 280.

4. *Tennent v. Tennent*, (1870), L.R. 2 Sc. and Div. 6, 9; *Cockell v. Taylor* (1851), 15 Beav. 103; *Pennell v. Miller* (1857), 23 Beav. 172; *Butler v. Miller* (1867), Ir. R. 1 Eq. 195, 210; *Rees v. De Bernardy*, [1896] 2 Ch. 437.

5. *Administrator General of Bengal v. Juggeswar Roy*, (1877) 3 Cal. 192, 196 P.C.

6. *Kedari Bin Ranu v. Atmarambhat*, (1866) 3 B.H.C.A.C. 11, 18, 19; *Bhimbhai v. Yeshwantrao*, (1900) 25 Bom. 126.

ments are essential. The presence of only one or two of them will not suffice. The mere registration, for example, of a document does not in the absence of consideration of a near relation or of natural love and affection between parties render itself enforceable.¹ It may be incidentally observed that even in England a specialty does not always render an agreement enforceable. An agreement to pay for future illicit cohabitation, for example, though made under seal will not be treated as binding in England.

An agreement to pay a certain sum out of natural love and affection to a near relation is a 'contract' under Section 25 of the Contract Act, and there is no reason why Section 37 of the Contract Act should not apply to it. As such, the agreement binds the legal representative of the promisor where no contrary intention appears from the contract.² The agreement has however to be registered. Cousins do not stand in a near relation to each other for the purposes of Section 25(1).³

A person and his father-in-law's divided brother's widow are not persons who can be said to stand in a near relation to each other within the meaning of Section 25(1).⁴ A muslim wife's parents stand in a near relation to her husband.⁵ A Muslim husband and his wife are near relations to each other.⁶ Brothers are near relations.⁷ An agreement without consideration in order to be enforceable under Section 25(1), must be motivated by the ingredient of natural love and affection as obtaining between the parties. The mere objective existence of a near relationship between the parties without the motivating force of natural love and affection will not render an agreement enforceable even though it is expressed in writing and is registered under the law for the registration of documents.⁸ If from the terms of a deed or from the evidence of the conduct of the parties leading to the execution of a registered document the Court believes that in spite of strained relations obtaining between the parties both before and after such execution the agreement in dispute was motivated by natural love and affection, though such love and affection was but short-lived, the agreement will be upheld as protected by Section 25(1) of the Contract Act.⁹ It is needless to say that the mere recitals of love and affection as the motivating factor should not suffice. Questions of coercion, undue influence, undesirable purchase of peace at all costs, and strained relations obtaining between

1. *Manna Lal v. Bank of Bengal*, (1876) 1 All. 300; *Tatia v. Babaji*, (1896) 22 Bom. 176, 181, 182; *Kaliprasad v. Prahlad*, (1869) 2 B.L.R. 122 P.C.

2. *Vijaya Ramraj v. Vijaya Ananda*, A.I.R. 1952 All. 564.

3. *Jafar Ali v. Ahmed Ali*, (1868) 5 B.H.C., A.C.J. 37.

4. *Taranata v. Gopalakrishna*, A.I.R. 1943 Mad. 591.

5. *Nisar Ahmad v. Rahmat Begum*, A.I.R. 1927 Oudh 126; (1927) 100 I.C. 350.

6. *Poonoo Bibee v. Fyez Buksh*, (1874) 15 B.L.R. App. 5.

7. *Venkataramy v. Rangasamy*, (1903) 13 M.L.J. 428.

8. *Appa Pillai v. Ranga Pillai*, (1882) 6 Mad. 71; *Rajlukhy Dabes v. Bhootnath*, (1900) 4 C.W.N. 488.

9. *Rajlukhy Dabes v. Bhootnath*, (1900) 4 C.W.N. 488; *Bhiwa Mahadshet v. Shivaram Mahadshet*, (1899) 1 Bom. L.R. 495.

the parties both before and after the execution of the registered deed cannot however be ignored by the Court. Natural love and affection of itself is not a good consideration in the law of contract and unless a transaction is protected under Section 25(1) it cannot sustain an agreement in the eye of the law.¹ All the requirements of Section 25 (1) have to be fulfilled.

Under a deed of trust the assessee was to get each one-eighth share in the income of the trust subject to a condition that in case their mother lived separate from either of them an amount of Rs. 9,000 was to be paid to her out of the share of the assessee from whom she lived separate. Each of the assessee executed a registered indenture in favour of their mother who had begun to live separately from both of them by which each agreed to pay Rs. 15,000 to her and created a charge on their private properties in respect of the amount. The question was whether the excess amount of Rs. 6,000 paid by the assessee to their mother was a permissible deduction from the assessee's income under Section 9(1)(iv) of the Income-tax Act. It was held that the charge created by the assessee in favour of their mother was supported by adequate consideration within Section 25(1) of the Contract Act.²

Agreements made by way of compensation.—An agreement though made without consideration will be valid if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do. A past act done voluntarily by a person for the benefit of another may be compensated by a promise made by the person benefited, and such promise will be a binding agreement even though the act was not done at the instance of the person benefited and was therefore no consideration in the strict sense of the term. *A* finds *B*'s purse and gives it to him. *B* promises to give *A* Rs. 50. This is a contract, that is, a binding promise. Similarly, where a person was legally compellable to do something but which he did not do, he can make a binding promise for compensating the person who has done the thing even though the person doing the thing did not do it at the desire of the promisor. *A* supports *B*'s infant son. *B* promises to pay *A*'s expenses in so doing. This is a contract, that is, an enforceable agreement.

In *Sri Mahadeoji v. Baldeo Prasad*, A.I.R. 1943 Oudh 89, it has been observed: "That which has voluntarily been done in the past cannot be made consideration for a promise to do something in future. There must be another promise as consideration for that promise." It will be submitted that the observation is obviously wrong and needs no comment. Section 25(2) is patently clear in its import. It has nothing to do with the concept of past consideration.

The observation made in *Pollock and Mulla, Indian Contract and Specific Relief Acts*, 8th edn. by M. C. Setalvad, 1957, page 204, that "Whitley

1. *H. P. Banerji v. Commissioner of Income-tax*, (1940) 20 Pat. 202: 192 I.C. 307: A.I.R. 1941 Pat. 59.

2. *Khanderao Gaekwar v. Commissioner of Income-tax*, A.I.R. 1949 Bom. 17.

Stokes rightly observes that this ('voluntarily') should be 'otherwise than at the desire of the promisor' does not appear to be well founded. Whitley Stokes,¹ Pollock and Mulla, and for that M. C. Setalvad,² and Sir Charles Farran, Acting Chief Justice, Bombay³, have observed that 'voluntarily' in Section 25(2) means 'not at his request' as opposed to 'at the desire of the promisor'.⁴ This observation of the learned jurists, editor, and judge does not appear to be an accurate one. The Legislature has aptly used the expression 'voluntarily' in Section 25(2) which dispenses with the requirement of consideration in a given class of cases of enforceable agreements. 'Otherwise than at the desire of the promisor' would not be adequate. See below.

Under Section 2(d) and 2(h) we have seen that any act, abstinence, or promise done, undertaken, or made will not necessarily constitute a consideration for a promise in the sense the term 'consideration' is understood in the English common law even though the said act was done, abstinence undertaken, or promise made by a person or a third person at the desire of a given person. The act, abstinence, or promise so done, undertaken, or made will constitute a consideration only where it was done, undertaken, or made with a view to creating a legal relation with the person at whose desire the act was done, abstinence undertaken, or promise made. The intention to create a legal obligation with the given person is *sine qua non* for the constitution of consideration and the formation of an enforceable agreement. When the intention to create a legal relation is not there, the act, abstinence, or promise though done, undertaken, or made by a person or a third person at the desire of the given person will not constitute a consideration which is ordinarily indispensable for the formation of a binding promise. The word 'voluntarily' in Section 25(2) means that the thing done in the past was done without any intention to create a legal obligation with the person benefiting.⁵ Suppose *B* is in straitened circumstances and *A* supplies him with ten maunds of rice without any promise, express or implied, on the part of *B* to pay for it. This is only an executed act. If *A* proposes to supply the rice without any intention to create any legal obligation with *B*, the proposal to supply will be only an executory act. None of the cases will be a case of executed or executory consideration. The supply of the rice or the proposal of the supply of the rice may be voluntarily undertaken by *A*. He may have voluntarily undertaken it at the desire of *B* or he may have voluntarily undertaken it independently of any desire expressed on the part of *B*. Now, however, if subsequently *B* makes a promise in favour of *A* to compensate him wholly

1. *Anglo-Indian Codes*, vol. I (1887).

2. *Ibid.*, 204, 213.

3. *Sindha Shri Ganpatsingji v. Abraham*, (1895) 20 Bom. 755, 758.

4. Section 2(d), definition of consideration.

5. *Suraj Narain v. Sukhu Ahir* (F.B.), 51 All. 164; 1928 All. 440; *Raja of Venkatagiri v. Krishnayya*, 50 Bom. L.R. 517; A.I.R. 1948 P.C. 150; *Kalipada v. Durgadas*, A.I.R. 1923 Cal. 677, 678.

or in part for the rice voluntarily supplied to him by *A*, the promise or agreement thus made will be enforceable against *B* though it was based on no consideration in the sense the term is understood in the English common law. Section 25(2) thus enables the promisee to enforce a promise or agreement though not based on any consideration once the promisor has undertaken to compensate the promisee wholly or in part for his having already voluntarily done something for the promisor. Clause (2) of Section 25 describes a fact-situation where consideration is not a *sine qua non* for the formation of an enforceable agreement.

The non-indispensability of consideration under Section 25(2) does not however imply the non-indispensability of the lawfulness of the object of an agreement which lawfulness is statutorily indispensable for the formation of a valid, that is, enforceable agreement. To take an example. An assassin murders Alumgir's brother. There has been no agreement for any reward to be made by Alumgir in favour of the assassin. The assassin has committed the murder voluntarily. He may have done it voluntarily at the desire of Alumgir or he may have done it voluntarily but independent of any desire on the part of Alumgir. Now suppose Alumgir subsequently makes a promise to compensate the assassin wholly or in part for his having voluntarily done something for him. The promise in question made by Alumgir would not be upheld in a court of justice administering the current Indian law of contract on the ground of the public policy of the law. Section 25(2) dispenses only with consideration in a given fact-situation and not with the lawfulness of the object of a given promise. The law in its public policy will not extend its sanction to any and every promise to compensate wholly or in part a person who has already voluntarily done something reprehensible for the promisor. It is only when the undertaking for compensation in given circumstances is not considered as opposed to the public policy of the law that it will be enforced.

As to past cohabitation as consideration *see* under Section 23, *Immoral, ante*.

Section 25(2) enables the promisee to enforce the promise, though made without the basis of any consideration, when it was given by the promisor to compensate him wholly or in part because he had already voluntarily done something for the promisor or had voluntarily done something for somebody else but which something the promisor was legally compellable to do. When the act done was done for a third person it must have been one which the promisor was legally compellable to do, and only then his undertaking to compensate the promisee therefor will be legally enforceable against him. *A* supported *B*'s infant son. *B* promises to pay *A*'s expenses in his having done so. The promise is enforceable against *B*. When something had been done, money expended, for example, voluntarily for third parties and not for the promisors and at the same time that something the promisors were not legally compellable to do, their undertaking to compensate the promisee could not fall within clause (2) of Section 25.¹ Consideration, as defined in

¹ 1. *Durga Prasad v. Baldeo*, (1880) 3 All. 321.

Section 2(d), may move from a third person and need not necessarily move from the promisee. It has always to be supplied at the desire of the promisor. The past act, on the other hand, sought to be compensated for under Section 25(2) must have moved from the promisee himself and may have been done either at the desire of the person benefiting or independently of any desire on his part. It has to be only voluntarily done. 'Voluntarily' means something done without any promise of compensation moving from the person benefiting.¹ Where moneys were advanced by the promisee to the promisor because of the undertaking given by the promisee's father, they were not advanced voluntarily on the part of the promisee and hence an agreement made by the promisor to compensate the promisee for the act so done did not fall within Section 25(2).² The act in question must have been also done by the promisee prior to the giving of the promise in question.³ Moreover, the intention of the promisor has to be to compensate the promisee for an act done. The promise must not be motivated by some other ulterior object.⁴ The question has also arisen as to whether the act voluntarily done must have been done for the promisor at a time when the promisor had already been in existence. In *Ahmedabad Jubilee S. & W. Co. v. Chhotalal*, (1908) 10 Bom. L.R. 141, 143, it has been held that a company cannot ratify acts of its promoters before it was incorporated or formed.⁵

Under Section 11, a minor is incompetent to contract. In some decisions it has been held that the act to be compensated for under Section 25(2) must have been done for the promisor at a time when he was not a minor and therefore competent to contract.⁶ In *Musammatt Kundan Bibi v. Sree Narayan*, (1907) 11 C.W.N. 135, and *Karm Chand v. Basant Kaur*, (1911) Punj. Record No. 31 (civil), it has been, on the other hand, held that the act to be compensated for need not necessarily be done at a time when the promisor had been a major. In *Suraj Narain v. Sukhu Ahir*, 51 All. 164 : A.I.R. 1928 All. 440, a full bench decision, it was held that consideration received by a person during his minority could not be a good consideration for a fresh promise by him after his attaining majority and that such a transaction did not fall within Section 25(2). A minor is not a person competent to contract. He cannot desire that a consideration should be supplied to him. Thus even though some act is done, or forbearance undertaken, at his instance by a person it will not be a consideration. A benefit, etc., received by him as a minor cannot therefore be treated by him as an executed consideration

1. *Suraj Narain v. Sukhu Ahir* (F.B.), 51 All. 164, per Sulaiman, Ag. C. J.

2. *Raja of Venkatagiri v. Krishnappa*, A.I.R. 1948 P.C. 150.

3. *Basanta Kumar v. Madan Mohun*, 46 I.C. 282 : (1918-19) 23 C.W.N. 639.

4. *Abdallakhan v. Purshottam*, (1947) Bom. 807 : (1947) 49 Bom. L.R. 875 : A.I. R. 1948 Bom. 265.

5. *Eley v. Positive Life Asses. Co.* (1876), 1 Ex. D. 88 C.A.

6. *Indran Ramswami v. Anthappa Chettiar*, (1906) 16 M.L.J. 422 ; *Suraj Narain v. Sukhu Ahir* (F.B.), (1928) 51 All. 164 : 26 A.L.J. 1024 : 112 I.C. 159 : A.I.R. 1928 All. 440.

even when he attains his majority.¹

The facts of *Suraj Narain v. Sukhu Ahir*, 51 All. 164: A.I.R. 1928 All. 440, were this: "One Suraj Narain lent a sum of money on 24th June, 1919, to one Sukhu Ahir who was at that date a minor. Nearly four years later, on 17th June, 1923, in consideration of the principal sum lent and interest which had swelled together to the sum of Rs. 76, Sukhu Ahir who had by that time attained majority and his mother gave a simple money bond to Suraj Narain. Suraj Narain brought a suit....He was met with the plea that the previous bond having been executed by a minor, could not form a valid consideration for the subsequent bond and the suit must fail."

Sulaiman, the Acting Chief Justice, rightly observed that 'voluntarily' meant that there should not be any understanding between the parties that compensation would be given for the act in future. It is on this ground, it may be observed, that Suraj Narain's earlier advance had not been made voluntarily in favour of Sukhu Ahir, and, consequently, such an act on the part of Suraj Narain could not be adopted in the eye of the law by Sukhu Ahir in order to constitute a binding bond on its basis to his prejudice. The Acting Chief Justice was however wrong when he observed that the expression 'done something for' did not mean, 'advance money to another person' and that doing something for a person was not paying money to him. His Lordship made the further observation that "compensate for something done" and "pay a debt" did not mean the same thing. Of course, they do not and need not. Clause (3) of Section 25, provides for time-barred debts whereas clause (2) provides for things done inclusive of advances of money made when they have been so done voluntarily, that is, without any intention to create a legal relation between the person who did the act and the person who benefited from such act. In *Govind Ram v. Piran Ditta*,² a full bench decision, the High Court at Lahore held that a contract entered into by a minor being null and void, its subsequent ratification by the minor on attaining the age of majority could not form a valid contract on which a suit could be maintained. The consideration which passed under the earlier contract could not be imported into the contract into which the minor entered on attaining majority. Section 25(2) of the Contract Act had no application to a contract of that kind. It will be submitted that the conclusion of Their Lordships can be maintained on two grounds, namely, that the subject of compensation was received by the promisor during his minority and secondly, the act to be compensated for was not done voluntarily by the promisor.

The payment of bonus does not come under Section 25(2) of the Contract Act as the employees render services in return for wages payable to them and not voluntarily.³ Bonus as such means an *ex gratia* payment and there cannot be an action to enforce the payment of such an *ex gratia* payment. If

1. *Bindeshri v. Chandika*, 49 All. 137: A.I.R. 1927 All. 242: 46 I.C. 765; *Indren Ramaswami v. Anthappa Chettiar*, 16 M.L.J. 422.

2. 16 Lah. 546: 37 P.L.R. 690: 158 I.C. 243: A.I.R. 1935 Lah. 561.

3. *Krishna v. Official Liquidator*, A.I.R. 1952 T.C. 99.

however it is established that in fact there was an agreement to pay a certain sum as bonus and that it would be part of the contract of service between the parties, such a contract is enforceable. It cannot therefore amount to a promise without consideration, the consideration being the plaintiff's service to the defendant on an express agreement that he was to be paid two sums, one described as salary and the other as bonus.¹ See the labour laws.

Agreements to pay time-barred debts.—A time-barred debt is ordinarily no consideration for a fresh promise to pay on the part of the debtor. An oral contract to repay made on the basis of a time-barred debt is an agreement without consideration and is, therefore, void, that is unenforceable. Section 25 however makes a special case of a time-barred debt when a promise is made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf to pay wholly or in part such debt. Only where the law for the limitation of suits is the bar for the realization of the debt, the debtor may make a binding promise in favour of the creditor for its repayment provided however the agreement is made in writing and is signed by the debtor as promisor or signed by his agent generally or specially authorized in that behalf. The unrealizable debt may thus be made a consideration for the later promise to repay if such promise is made in writing and signed by the promisor or by his agent. A owes B Rs. 1,000, but the debt is barred by the law of limitation. A signs a written promise to pay Rs. 500 on account of the debt. This is a contract, that is, a promise enforceable in law. An oral promise to repay a time-barred debt is not enforceable.

A time-barred debt is undoubtedly a debt which continues to be due from the debtor though the remedy for its recovery through Courts may have been barred. Such debt can form a valid necessity for a transfer.² Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. An express promise to pay cannot be inferred from a mere acknowledgment.³ A mere acknowledgment of liability without any express promise to pay will not suffice for Section 25(3).⁴

Clause (3) of Section 25 does not require that in the writing itself the consideration should be described as past debt, when in fact it was such past

1. *Shanmugasundaram v. Chidambaram*, A.I.R. 1953 Mad. 433; *Kanaka Sabapathi v. Haji Oesman*, A.I.R. 1925 Mad. 192 : 47 M.L.J. 791.

2. *Kishan v. Bachna*, A.I.R. 1954 Pepsu 44; *Budh Singh v. Bhan Singh*, A.I.R. 1934 Lah. 962; *Gajadhar v. Jagannath (F.B.)*, 46 All. 775 : A.I.R. 1924 All. 551.

3. *Allah Bakhsh v. Hamid Khan*, A.I.R. 1931 All. 160; *Raj Narain v. Ram Sarup*, A.I.R. 1930 All. 467; *Gobind Das v. Sarju Das*, (1908) 30 All. 268 : 5 A.L.J. 274 : (1908) A.W.N. 129.

4. *Ba'harhar v. Baij Nath*, A.I.R. 1938 Lah. 264.

debt and was known to the debtor as such.¹ A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by the statute of limitations. The note was held as covered by clause (3) of Section 25.²

A promise to pay under Section 25(3) will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt and no knowledge was there of the debtor that the debt was barred before the promise was made.³

The debt of an insolvent who has obtained his final discharge is not a debt and cannot therefore form the consideration of a fresh enforceable promise.⁴

An undertaking to execute an agreement for mortgage to pay off a time-barred debt is not a promise to pay the debt for the purposes of Section 25(3).⁵ A promise to pay the amount which may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within the meaning of Section 25, the amount not being a liquidated sum.⁶ Liquidated means ascertained and fixed in amount.

A promise to pay an unascertained sum is not a promise to pay a "debt" within the meaning of Section 25(3) of the Contract Act. Where the recital in an *ekrarnama* showed that the mortgagors promised to pay an amount which might be found due on taking accounts, that is, an ascertained sum, the promise thus made was not construed as one falling under Section 25(3) of the Contract Act.⁷ A decretal debt barred by limitation can be adopted as consideration under Section 25(3).⁸

If a person who is in possession of the property is liable to be proceeded against in an action, that would be sufficient to put him under an obligation to pay the debt for the purposes of Section 25(3) of the Contract Act. The obligation need not be personal but an obligation in the sense of an action being maintainable against the person in respect of the property in his hands. The words "the person to be charged therewith" in Section 25(3) need not refer only to a person who was initially or originally liable but may refer also to third parties who have undertaken the liability, though not personally, but

1. *Kasturchand v. Manekchand*, A.I.R. 1943 Bom. 447; *Chandra prasad v. Varajlal*, 8 Bom. L.R. 644; *Sandhura v. Kehr Singh*, A.I.R. 1936 Lah. 1016; *Abdullakin v. Maung Ne Dun*, (1929) 7 Rang. 292; 119 I.C. 738; A.I.R. 1929 Rang. 240.

2. *Ganapathy v. Munisawmi*, (1910) 33 Mad. 159.

3. *Muthayee Achi v. Sabbiah*, A.I.R. 1951 Mad. 903; *Ganapathy v. Munisawmi*, (1910) 33 Mad. 159; 5 I.C. 754; *Appa Rao v. Suryaprakasa*, (1899) 23 Mad. 94 relied on.

4. *Naoroji v. Kazi Sidick*, (1896) 20 Bom. 636, 642, 643.

5. *Allah Bakhsh v. Hamid Khan*, (1931) All. L.J. 56; 130 I.C. 702; A.I.R. 1931 All. 160.

6. *Doraisami v. Vaithilinga* (F.B.), (1917) 40 Mad. 31; A.I.R. 1918 Mad. 1145; *Sabju Sahib v. Noordin Sahib*, (1899) 22 Mad. 139, 143.

7. *Sheobachan v. Madho Saran*, A.I.R. 1952 Patna 73, 77; *Doraisami v. Vaithilinga* (F.B.), 40 Mad. 31; A.I.R. 1918 Mad. 1145.

8. *Niaz Ahmad v. Parshotam*, (1930) 53 All. 374; 129 I.C. 545; A.I.R. 1931 All. 154; *Shripatray v. Govind*, (1890) 14 Bom. 390; *Billings v. Uncovenanted Service Bank*, (1881) 3 All. 781; *Heera Lall v. Dhunput*, (1878) 4 Cal. 500.

by reason of their owning the properties.¹

An agreement by the plaintiff to release the defendant's brother from liability if it is legally enforceable at the time when the agreement is reached is quite a good consideration for a new agreement between the parties whereby the defendant undertakes to pay a certain amount.² Section 25(3) makes good consideration of a time-barred debt for a fresh agreement only when it was the debt of the promisor himself and not of a third person.³ In *Govinda v. Achutan*,⁴ the literal meaning of clause (3) of the Section seems to have been taken. It was observed that the words "by the person to be charged therewith" in Section 25(3) are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning.

It will be submitted that time-barred debts of third persons if allowed to form good considerations for the promisors under Section 23(3) will render the concept of consideration nugatory to a very great extent and will also tend to give Section 25(3) an import much wider than the lawgivers had intended.⁵

A promise to pay a part of the barred debt cannot be taken to be a promise to pay the whole of the debt. Thus, if a person promises to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt.⁶

A manager as such is not competent to bind the other members of a joint Hindu family by a promise to pay a debt already statute-barred.⁷ A minor's guardian is not an agent *apropos* Section 25(3).⁸ A pleader is not an agent for clause (3) of Section 25 unless he is specially authorized in that behalf.⁹ It is open to an executor to promise to pay the deceased's time-barred debts.¹⁰

The Deputy Commissioner acting on behalf of the Court of Wards is

1. *Adiraja v. Beeranna*, A.I.R. 1957 Mad. 14; *Rama Pattar v. Viswanatha Pattar*, 45 Mad. 345; A.I.R. 1922 Mad. 23; *Govinda v. Achutan*, A.I.R. 1940 Mad. 678 followed.

2. *Govinda v. Achutan*, A.I.R. 1940 Mad. 678.

3. *Asa Ram v. Karam Singh*, (1929) 51 All 983; 119 I.C. 109 A.I.R. 1929 All. 586; *Champaklal v. Rayachand*, 34 Bom. L.R. 1005; A.I.R. 1932 Bom. 522; *Pestonji v. Bai Meherbai*, (1928) Bom. L.R. 1407; 112 I.C. 740; A.I.R. 1928 Bom. 539; *Nazir Ahmad v. Jiwan Das*, A.I.R. 1938 Lah. 159; *Abani Bilas v. Kanti Chandra*, 38 C.W.N. 253; A.I.R. 1934 Cal. 178; 148 I.C. 1035.

4. A.I.R. 1940 Mad. 678.

5. *Tilakchand v. Jitmal*, (1873) 10 B.H.C. 206, 215.

6. *Govinda v. Achutan*, A.I.R. 1940 Mad. 678; *Abani Bilas v. Kanti Chandra*, A.I.R. 1934 Cal. 178.

7. *Nagarmal v. Bajranglal*, A.I.R. 1950 P.C. 15; (1950) 77 I.A. 22; 29 Pat. 272; 52 Bom. L.R. 467.

8. *Narottandas v. Bhagwansang*, 41 Bom. L.R. 896; 186 I.C. 66; A.I.R. 1939 Bom. 464; *Manikya v. Pushpa*, 115 I.C. 263; A.I.R. 1928 Cal. 850.

9. *Bansidhar v. Babu Lal*, (1923) 21 All. L.J. 713; 75 I.C. 309.

10. *Pestonji Manekji v. Bai Meherbai*, A.I.R. 1928 Bom. 539.

not an agent generally or specially authorized to pay a time-barred debt within the meaning of Section 25(3) of the Contract Act. There is no provision in the U.P. Court of Wards Act which would entitle the Court of Wards to acknowledge or pay off a time-barred debt of its ward.¹ The power of a *karta* of a joint family is not unlimited.²

A Collector as agent to the Court of Wards is not an agent for a ward for the purposes of Section 25(3).³

A mother succeeding to the estate of her son is not competent to alienate the property in order to discharge the time-barred debt of her husband or her son.⁴

A promise as required by sub-section (3) of Section 25 must be distinct or express promise in the sense that the language must indicate a statement of the borrower that payment would be made in future. It has to be something more than a mere acknowledgment of debt where a promise can be usually read only by implication. For the purposes of the sub-section (3), a written promise should be discernible in the agreement itself.⁵

Unless a promise to pay is in writing it cannot fall within the purview of Section 25(3). The implied promise to pay which is contained in all acknowledgments does not attract the provisions of Section 25(3) because the implied promise to pay is not a promise to pay in writing as contemplated in Section 25(3). Consequently, the words "after taking old accounts into consideration there remains to be paid a balance of Rs. 3,200" in an acknowledgment do not amount to a promise to pay within the meaning of Section 25(3). An implied promise is not sufficient.⁶ In *Chowksi Himatlal v. Chowksi Achrutlal*, (1884) 8 Bom. 194, a full bench decision, it was held that a *khata*, or account stated, bearing a stamp of one anna, but containing no promise in writing was a mere acknowledgment and not a contract within the meaning of Section 25, clause 3, of the Contract Act. When however there is a balance struck and interest has been fixed or agreed to be paid,

1. *Anand Behari v. Deputy Commissioner, Bara Banki*, (1939) 15 Luck. 308 : 185 I.C. 290: A.I.R. 1940 Oudh 107.

2. *Sanyasi Charan v. Krishnadhan*, (1922) 49 Cal. 560 P.C.

3. *Suryanarayana v. Narendra*, (1895) 19 Mad. 255.

4. *Anganna v. Ayyasami*, A.I.R. 1953 Mad. 706; *Sheoram v. Sheoratan*, 43 All. 604 : A.I.R. 1921 All. 163.

5. *Suraiya v. Hamid Ali Khan*, A.I.R. 1949 Oudh 48; *Chowksi Himatlal v. Chowksi Achrutlal*, (F.B.) (1884) 8 Bom. 94.

6. *Shivjiram v. Gulabchand*, A.I.R. 1941 Nag. 100; *Ramprasad v. Anandi*, (1940) Nag. 441 : A.I.R. 1938 Nag. 180 : 174 I.C. 374; *Balkrishna v. Jayshankar*, 40 Bom. L.R. 1010 : A.I.R. 1938 Bom. 460 : 178 I.C. 174; *Govinda v. Achutan*, (1940) I.M.L.J. 682; 193 I.C. 399 : A.I.R. 1940 Mad. 678; *Ghulam Murtaza v. Fasih-un-nisa*, (1935) 57 All. 434 : 152 I.C. 370 : A.I.R. 1934 All. 129; *Mt. Janaka v. Kali Charan*, (1932) 7 Luck. 313 : 135 I.C. 390 : A.I.R. 1932 Oudh 49; *Girdhari v. Bishun*, (1932) 54 All. 506 : 140 I.C. 783 : A.I.R. 1932 All. 461; *Abdul Rafiq v. Bhajan*, (1932) 53 All. 963; 137 I.C. 243 : A.I.R. 1932 All. 199; *Mihin Lal v. M.B. Dairy Farm*, 132 I.C. 420 : A.I.R. 1932 All. 38.

the words have been construed to mean a promise to pay within the meaning of Section 25(3).¹

Where the words used are "baqui dene", "baqui lene" "baki deva", 'mablaghandi', 'baki rahe', 'balance struck', 'balance due', or 'amount due' in the handwriting of the creditor and the entry is signed by the debtor it amounts only to an implied promise and not an express one, to pay on the part of the debtor within the meaning of Section 25(3).² The construction of the document in question will enable the Court to decide as to whether it is protected under Section 25(3).³

Simple acknowledgment of the form of 'baqi rahe lene lekha kar ke', 'baqi rahe', 'baqi rahe lene', 'baqi lene' or 'baqi dene' does not amount to a promise to pay and does not give fresh cause of action under Section 25(3) of the Contract Act. The promise to pay, necessary to bring a case within Section 25(3), must be in writing under Section 9; such a promise is an express promise and the document must bear words like 'I promise to pay', 'I undertake to pay' or 'I shall send', or the like.⁴ The expression 'nuqsan deyne' or 'dewne kite' was construed as a promise to pay within the meaning of Section 25.⁵

An acknowledgment of liability containing an express promise to pay the debt even if made after the expiry of limitation constitutes a fresh promise to pay within the meaning of Section 25(3).⁶ Section 25(3) of the Contract Act, where applicable, thus excluded Article 85 of the Indian Limitation Act, 1908.⁷ Now see the Limitation Act, 1963, Section 29 and item 1 of the Schedule thereto.

1. *Shanti Parkash v. Harnam Das*, (F.B.) A.I.R. 1938 Lah. 234; *Sirdar Kuar v. Chandrawati*, (1882) 4 All. 330.

2. *Sri Kishen Baldeo v. Dewan Chand*, A.I.R. 1955 Ajmer 59; *Ratanchand v. Khet Singh*, A.I.R. 1954 M.B. 11; *Shadi Ram v. Prabhu*, A.I.R. 1953 Punj. 28; *Shiv Ram v. Faiz*, (1942) 23 Lah. 282; *Balkrishna v. Jayashankar*, 40 Bom. L.R. 1010; 178 I.C. 174; A.I.R. 1938 Bom. 460; *Ranchhodas v. Jeychand*, (1884) 8 Bom. 405; *Sasi Kanta v. Sonaula*, 33 C.W.N. 965; 121 I.C. 412; A.I.R. 1929 Cal. 444; *Debi Prasad v. Bhagwati Prasad*, A.I.R. 1943 All. 63.

3. *Govind v. Sarju*, (1908) 30 All. 268; *Prahlad v. Bhagwan*, (1926) 49 All. 496; 100 I.C. 593; *Hanna Ram v. Jhanda Singh*, 129 I.C. 90; A.I.R. 1929 Lah. 591; *Tulsiram v. Zaboo*, (1948) Nag. 639; A.I.R. 1949 Nag. 229; *Suraya Begum v. Hamid Ali*, (1949) 23 Luck. 47; A.I.R. 1949 Oudh 48; *Sriram v. G.-G. in Council*, A.I.R. 1952 Cal. 443.

4. *Shadi Ram v. Prabhu*, A.I.R. 1953 Punj. 28; *Shiv Ram v. Faiz*, 23 Lah. 282; *Appa Rao v. Suryaparakasa* (1899), 23 Mad. 94; *Daula v. Gonda*, (1903) Punj. Rec. 35; *Laxumibai v. Ganesh*, (1900) 25 Bom. 373; *Chatur v. Tulsi*, (1877) 2 Bom. 230; *Raghoji v. Abdul Karim*, (1877) 1 Bom. 590.

5. *Nihalu Ram v. Radhu Ram*, A.I.R. 1934 Lah. 835; *Kanshi Ram v. Arjan Das*, 137 I.C. 840; A.I.R. 1932 Lah. 470; *Fateh Chand v. Ganga Singh*, 10 Lah. 748; 115 I.C. 853; A.I.R. 1929 Lah. 264 relied on.

6. *Bhansarlal v. Navalkishore*, A.I.R. 1958 M. P. 21; *Hiralal v. Badkulal*, A.I.R. 1953 S.C. 225.

Kahan Chand Dula Ram v. Daya Ran Anrit Lal, (1923) 118 I.C. 764; *Tilakchand v. Jitmal*, (1873) 10 B.H.C. 206, 215.

There was a vital difference between an acknowledgment under Section 19 of the Limitation Act, 1908, and a fresh promise under Section 25(3) of the Contract Act. An unconditional acknowledgment was sufficient for the purpose of Section 19 of the Limitation Act, 1908, because such an acknowledgment implied a promise to pay. To accept an implied promise as the equivalent of a "promise in writing" would make Section 19 of the Limitation Act, 1908, *otiose* because the same result by way of an acknowledgment would be reached irrespective of whether it was taken during the period of limitation or outside it.¹ Section 19 of the Limitation Act, 1908, required the acknowledgment in writing to be made while the period of limitation had not yet expired while Section 25(3) of the Contract Act enabled the promisor to make a signed promise in writing enforceable against himself even when such promise had been made after the original debt had been time-barred.² Under the general law of contract, while the cause of action still survives a written acknowledgment or oral agreement to extend the time of payment is enforceable. An oral agreement to extend the time of payment of an amount not already barred did not contravene the provisions of Section 29 of the Limitation Act, 1908, or Section 25 of the Contract Act; but gave a fresh starting point of limitation.³ When the scope of Section 19 of the Limitation Act, 1908, had been exhausted because of the efflux of time, the provisions of Section 25(3) of the Contract Act could be availed of, provided an express promise was made in writing and signed.⁴ Now see Section 18 of the Limitation Act, 1963.

A mere implied promise to pay such as is conveyed by an unconditional acknowledgment is not sufficient to fulfil the requirements of Section 25(3) of the Contract Act and cannot furnish a fresh cause of action for time-barred debts. An acknowledgment without an express promise in writing cannot be interpreted as a promise under Section 25.⁵ A receipt by the debtor was executed after understanding the account. It stated that a certain amount was justly due from the debtor. It was held that although

1. *Tulsram v. Zaboo*, A.I.R. 1949 Nag. 229; *Ganeshprasad v. Tombati*, A.I.R. 1942 Nag. 92; (1942) Nag. 369; *Ramprasad v. Anandi*, A.I.R. 1938 Nag. 180; (1940) Nag. 441; *Ram Mangal v. Ahhaibar Prasad*, A.I.R. 1954 Pat. 575.

2. *Magantal v. Amichand*, (1928) 52 Bom. 521; 112 I.C. 24; A.I.R. 1928 Bom. 319; *Asirvada v. Vedamuthu*, (1924) 86 I.C. 942; *Maniram v. Rupchand*, 33 Cal. 1047, 1058; (1906) 33 I.A. 165, 172. Section 18 of the Limitation Act, 1963, replaces Section 19 of the Act of 1908.

3. *Shrinivas v. Raghunath*, (1902) 4 Bom. L.R. 50; *Ibrahim v. Lalit Mohan*, (1923) 50 Cal. 974; 79 I.C. 489; A.I.R. 1924 Cal. 388; *Maniram v. Rupchand*, 33 Cal. 1047, 1058; (1906) 33 I.A. 165, 172; *Bindas v. Chota*, (1912) 16 C.W.N. 636, 638; *Watson v. Yates*, (1887) 11 Bom. 580; *Md. Abdulla v. Bank Instalment Co.*, (1909) 31 All. 495, 497.

4. *Debi Prasad v. Bhagwati Prasad*, A.I.R. 1943 All. 63; *Nur Hussein v. Tamijuddin*, 197 I.C. 321; A.I.R. 1941 Cal. 449; *Niaz Ahmad v. Parshotam*, (1930) 53 All. 374; 129 I.C. 545; A.I.R. 1931 All. 154; *Deoraj v. Indrasan*, (1929) 8 Pat. 706; 120 I.C. 470; A.I.R. 1929 Pat. 258; *Ram Bahadur v. Damodar*, (1921) 6 Pat. L.J. 121; 60 I.C. 514; *Ganga Prasad v. Ram Dayal*, (1901) 23 All. 502, 504.

5. *Mahendrasinhji v. Abdul Vali*, A.I.R. 1952 Sau. 79.

the words meant an implied promise to pay, they did not amount to an express promise in writing such as Section 25(3) of the Contract Act requires. A statement made by a debtor as a witness in the Court admitting a time-barred debt does not fulfil the requirements of Section 25(3) of the Contract Act.¹ A conditional offer rejected by the other party does not amount to a promise within Section 25(3) so as to save limitation.²

Account stated.—An account stated is a thing different from an acknowledgment. In an account stated there is consideration in the shape of an agreement that items on one side of the account be taken as paid by items on the other side.³ In an account stated it does not matter if some of the items are time-barred. It would be a different thing if all the items are time-barred. If the whole account is time-barred, then the ban imposed by Section 25(3) of the Contract Act would apply.⁴

The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action.

There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such extent, so that there will be complete satisfaction on payment of the agreed balance. Hence there is mutual consideration to support the promises on either side and to constitute the new cause of action.⁵

An account stated is no more than an agreement and when the entire claim is barred prior to the date of the settlement, the account stated cannot give rise to any new cause of action unless it amounts to an express promise within the meaning of Section 25(3). When the entire claim is not barred but only a portion thereof, the maximum that can be said is that the consideration for the settlement is inadequate. The position however is different when the entire claim is barred. In such a case there is no consideration at all and the agreement will be void unless it is saved by Section 25(3).⁶

1. *Sambayya v. Shemsherkhan*, A.I.R. 1963 Andhra 337.

2. *Shyam Sundar v. Parlakimedi Municipality*, A.I.R. 1964 Orissa 111.

3. *Siqueira v. Noronha*, A.I.R. 1934 P.C. 144 (a case from Eastern Africa).

4. *Ganeshprasad v. Rombati Bai*, A.I.R. 1942 Nag. 92; *Kesar Singh v. Sant Ram*, (1937) 18 Lah. 234; A.I.R. 1937 Lah. 865; 169 I.C. 608; 39 P.L.R. 921; *Tulsi Ram v. Zaboo*, A.I.R. 1949 Nag. 229; *Siqueira v. Noronha*, A.I.R. 1934 P.C. 144; 151 I.C. 90; *Bishun Chand v. Girdhari*, 56 All. 376; A.I.R. 1934 P.C. 147.

5. *Bishun Chand v. Girdhari Lal*, 56 All. 376; A.I.R. 1934 P.C. 147.

6. *Chacko v. Thommen*, (F.B.) A.I.R. 1958 Kerala 31; *Ran Bahadur v. Hanuwant*, A.I.R. 1957 Raj. 29; *Tulsiram v. Zaboo*, A.I.R. 1949 Nag. 229; *Ganesh v. Rombati*, A.I.R. 1942 Nag.

Ordinarily, a *khata* or account stated is treated as a mere acknowledgment and not as an express promise under Section 25(3) of the Contract Act.¹ Where, however, an express promise has been made in course of the *khata* or account stated the case will be obviously protected under Section 25(3).²

Every partner of a firm has in law an inherent right to sign an "account stated" and must therefore be presumed to act as such. Where it is found that the "account stated" is signed by a managing partner who had actual power to act and sign on behalf of the firm, the firm is liable on it. A promise to pay is a condition precedent to the applicability of Section 25 of the Contract Act. When an "account stated" is signed by the party sought to be made liable or by its duly authorized agent, the "account stated" as envisaged in Article 64 is created. Such an "account stated" gives rise to a new cause of action and a suit brought within three years of the date of such a cause of action is not barred by limitation.³ Now see Article 26 of Schedule to the Limitation Act, 1963.

Promise to pay.—An agreement which is made for consideration does not come within the purview of the principle of Section 25.⁴ Thus, an agreement to pay a time-barred debt for consideration such as a further loan which need not be adequate, would be perfectly valid and would amount to a contract under Section 2 of the Contract Act and enforceable at law. Such an agreement does not fall under Section 25.⁵

Wherever there is a balance struck and the interest has been fixed or agreed to be paid, the words have been construed to mean a promise to pay within the meaning of Section 25(3).⁶

Whenever an acknowledgment is coupled with an agreement to pay interest, it cannot be regarded as a mere acknowledgment but should be regarded as an agreement with a promise to pay within the meaning of Section 25(3).⁷ If a person takes a sum from another person on condition

92; *Siqueira v. Noronha*, 38 C.W.N. 813; 151 I.C. 90; A.I.R. 1934 P.C. 144; *Om Prakash v. Abdul Rahim*, 117 I.C. 377; A.I.R. 1929 Lah. 511.

1. *Ramji v. Dharma*, (1882) 6 Bom. 683; *Chowksi Himutlal v. Chowksi Archruttal*, (1883) 8 Bom. 194; *Jethibai v. Pullibai*, (1912) 14 Bom. L.R. 1020; *Debi Prasad v. Ram Ghulam*, (1914) 19 C.L.J. 263; 25 I.C. 89; *Satyaketu v. Ramesh*, (1932) 60 Cal. 714; 37 C.W.N. 326; 146 I.C. 834; A.I.R. 1933 Cal. 658; *Shivjiram v. Gulabchand*, (1941) Nag. 144; 194 I.C. 806; A.I.R. 1941 Nag. 100.

2. *Chandraprasad v. Varajlal*, (1906) 8 Bom. L.R. 644; *Bhagwan v. Munshi*, (1917) Punj. Rec. 66; *Mahbub v. Nur-ud-Din*, (1905) Punj. Rec. 102.

3. *Gharabharan v. Radha Kishan*, A.I.R. 1958 All. 313.

4. *Bipin v. Masrab*, A.I.R. 1961 Ass. 173.

5. *Mahendrasinhji v. Abdul Vali*, A.I.R. 1952 Sau. 79; *Debi Prasad v. Bhagwati Prasad*, (1943) All. 171; A.I.R. 1943 All. 63; *Nath Sah v. Durga Sah*, 58 All. 382; A.I.R. 1936 All. 160; *Abdul Rafiq v. Bhajan*, 53 All. 963; A.I.R. 1932 All. 199; *Ghulam Murtaza v. Fasih-un-nissa Bibi*, 57 All. 434; A.I.R. 1935 All. 129.

6. *Shanti Prakash v. Harnam Das*, (F.B.) (1937) 19 Lah. 193; 174 I.C. 277; A.I.R. 1938 Lah. 234.

7. *Debi Prasad v. Bhagwati Prasad*, A.I.R. 1943 All. 63; *Shanti Prakash v. Harnam*, (F.B.) (1937) 19 Lah. 193; 174 I.C. 277; A.I.R. 1938 Lah. 234; *Tulsi Ram v. Zabeo*, (1948) Nag. 639; A.I.R. 1949 Nag. 229; *Prahlad v. Bhagwan*, (1926) 49 All. 496.

that it shall carry interest at a particular rate then in legal language he takes a loan and incurs a debt, and in all debts and loans the law implies an obligation on the part of the debtor or borrower to pay back the loan and a promise to pay is implicit. Where at the time of loan a fresh advance of Rs. 56 is made and Rs. 1,244 are due on an old account which had become barred by time, the contract cannot be regarded as one wholly without consideration. The consolidated *sarkhat* executed by the debtor embodies a new contract for a fresh consideration and the entire amount due thereunder can be recovered from its executant. Section 25 only applies to contracts which are wholly without consideration and not to contracts which may be for an inadequate consideration. Hence, sub-section (3) only applies when a wholly gratuitous promise is made to pay a time-barred debt and not to those cases when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate. A mere acknowledgment of debt without more is not sufficient to satisfy the conditions of Section 25(3) and an express promise to pay is necessary. The words "balance due" or "amount due" endorsed by a debtor in the creditor's account-books import an implied promise and not an express promise to pay.¹

In order to satisfy the terms of Section 25(3) there must be a promise to pay a debt; the debt must be one of which the creditor might have enforced payment but for the law for the limitation of suits; the promise must be made in writing; and the writing must be signed by the person to be charged therewith or by his agent generally or specially authorized on his behalf. On the fulfilment of these conditions, the promise becomes a contract though there may not be any consideration for it. The plaintiff brought a suit against the E.I. Railway for recovery of compensation for short delivery of goods. The defendant pleaded bar of limitation. The plaintiff relied upon a letter sent by the Chief Commercial Manager of the Railway in which it had been stated that a pay order for a certain amount had been sent to the plaintiff in full and final settlement of his claim. The letter was held as not containing a promise sufficient to satisfy the requirements of Section 25(3), and therefore there was no contract to pay within the meaning of that Section.²

Where the debtor proposes in a letter to pay a time-barred debt by monthly instalments and remits some of the instalments as proposed, the acceptance of the instalments by the creditor constitutes acceptance of the proposal by conduct so as to convert the proposal into a promise within the meaning of Section 25(3).³

The plaintiff's claim on the basis of a pro-note executed by the defendant

1. *Debi Prasad v. Bhagwati Prasad*, A.I.R. 1943 All. 63; *Ram Lal v. Karam Chand*, A.I.R. 1938 Lah. 155.

2. *Sriram Arjundas v. G.-G. in Council*, A.I.R. 1952 Cal. 443.

3. *George Newnes Book Co. v. K. V. S. Iyer*, A.I.R. 1940 Rang. 159; *Appa Rao v. Suryabakasa Rao*, (1899) 23 Mad. 94.

was barred by limitation. The defendant applied to the Debt Conciliation Board for relief and made a statement before the Board undertaking to pay his creditors including the plaintiff at the rate of seven annas in the rupee, if he was granted four months time. Some of the creditors accepted the offer but the plaintiff refused it. Subsequently, the plaintiff brought a suit to recover his debt founding his claim under Section 25 (3) on the basis of the offer made by the defendant before the Debt Conciliation Board. It was held that Section 25(3) was based on an agreement. As the plaintiff had refused the defendant's offer there was no agreement and hence the offer could not be made the basis of a claim under Section 25(3).¹

From the wordings of Section 25(3) it appears that what is especially insisted on in clause (3) is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. Apart from the writing and signature, *sine qua non* for the application of clause (3),² the general rules governing the formation of a contract will govern clause (3) of Section 25 as well. The proposal, acceptance or writing and signature in question do not seem to call for any special treatment. The proposal or acceptance, when taken either of them, may be either express or implied or partly express and partly implied; only the resultant promise must be made in writing and signed as required in clause (3). Only on the construction of the whole affair a Court will be enabled to ascertain whether or not a concluded promise had been reached. The several decisions³ should be viewed accordingly.

A letter offering to pay compensation on certain terms is not a promise of the kind mentioned in Section 25(3), and does not give fresh start of limitation.⁴

Gifts.—Explanation 1 to Section 25 makes it clear that a gift when actually made will be treated as a valid one between the donor and the donee. The question of consideration will not be considered relevant so far as an executed gift is concerned.⁵ A gift may however be tainted with undue influence, fraud, coercion, misrepresentation, or mistake.⁶ The personal law of the citizen as well as the public policy of the law may render a gift void. See under *Opposed to public policy*, Section 23, *ante*.

1. *Venkatappayya v. Venkatappayya*, A.I.R. 1946 Mad. 72.

2. *Ramprasad v. Anandi*, A.I.R. 1938 Nag. 180.

3. *Appa Rao v. Suryaprakasa*, (1899), 23 Mad. 94, 97, 98; *George Newnes Book Co. v. K. V. S. Iyer*, (1940) Rang. 377: 189 I.C. 622: A.I.R. 1940 Rang. 159; *Venkatappayya v. Venkatappayya*, A.I.R. 1946 Mad. 72; *Sriram v. G. G. in Council*, A.I.R. 1952 Cal. 443.

4. *Union of India v. Bikaner Textiles*, A.I.R. 1961 Raj. 211.

5. *Gopal Saran v. Sita Devi*, 36 C.W.N. 392: 34 Bom. L.R. 470: 135 I.C. 753: A.I.R. 1932 P.C. 34; *Bai Hiradevi v. Official Assignee of Bombay*, A.I.R. 1955 Bom. 122, 126.

6. *Annoda Mohun v. Bhuban Mohini*, (1901) 28 Cal. 546, 548; *Nanjamma v. Lingappa*, (F.B.) 4 D.L.R. (Mys.) 118; *Shivagangawa v. Basangouda*, A.I.R. 1938 Bom. 304. *Wazid Khan v. Ewaz Ali Khan*, Cal. 545 P. C.

26. Every agreement in restraint of the marriage of any per-

son other than a minor, is void.
 Agreement in restraint of marriage void.

Agreement in restraint of marriage.—An agreement in restraint of marriage of any person who is not a minor is unenforceable in law. It appears that in the interest of a minor the Legislature has made an exception in favour of an agreement which seeks to restrain a minor from marriage. Marriage itself is governed by the personal law of a person, subject, of course, to the various legislations governing the subject. The Child Marriage Restraint Act, 1929, as well as the Hindu Marriage Act, 1955, for examples, have prescribed the minimum age limits for marriage. The reference made in Section 26 to a minor means that a person who is not a minor according to the Indian Majority Act, 1875, cannot be restrained from marriage by means of any contract. A provision in an agreement seeking to restrain a major from marriage will be void on the ground of the statutory prohibition as contained in Section 26 of the Contract Act. Whitley Stokes thought that "As the Section is worded, an agreement in restraint of A's marriage at any time would be valid if A were minor at the date of the agreement."¹ It appears, however, that such a contract can be valid and operative only if the marriage was promised as to take place during the minority of the boy or the girl.

Section 9 of the Child Marriage Restraint Act, 1929, implies that a child marriage is a valid marriage in spite of its penal consequences, for which see Sections 3 to 6, *ibid*. This is so, in spite of the court's power to issue an injunction prohibiting marriage in contravention of the Act, for which see Section 12, *ibid*. Marriage solemnized after the commencement of the Hindu Marriage Act, 1955, and in contravention of any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the said Act are null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity.² Violation of clause (iii) or (vi) of Section 5 of the Act does not render the marriage void or voidable. As to voidable marriages under the Act, see Section 12, *ibid*.

A child marriage is a valid marriage in spite of its penal consequences under the Child Marriage Restraint Act, 1929. This, however, does not mean that a contract of marriage entered into by a person who is a minor under the Indian Majority Act, 1875, will be a valid one. Such a contract will be hit by Section 11 of the Contract Act. Similarly, contracts of marriage entered into by guardians of minors in violation of any one of the Acts governing a particular marriage will be void even though a particular marriage, where effected, may be held valid under the statutory provisions of a given Act or on the ground of public policy of the law. Where the contract has been entered into by a guardian for the marriage of a minor

1. *Anglo-Indian Codes*, vol. I, (1887), 563.

2. Section 11, *ibid*.

and such contract is not opposed to the provisions of any Act or the policy of any Act and there has been a breach in its performance, the guardian will be held liable for damages. A contract for marriage cannot be specifically enforced, but that does not bar a decree of damages for the failure to perform the contract.¹

In *Rao Rani v. Gulab Rani*, A.I.R. 1942 All. 351, the High Court at Allahabad doubted as to whether a partial or indirect restraint of marriage was within the scope of Section 26. There is no reason why the wordings of the Section should be construed as saving a partial or indirect restraint of marriage. Marriage should also mean re-marriage. The view taken in *Latafatunnisa v. Shaharbanu*, A.I.R. 1932 Oudh 208 : 139 I.C. 292, seems to have been unnecessarily influenced by the rules of English common law on the subject. In *Latafatunnisa's* case it was thought that a restraint on absolute marriage was different from a restraint on re-marriage. A condition in a *wakf* that if the widow of a co-sharer married, she would forfeit her right to the profits under the *wakf* was accordingly held valid.

The English law of restraint of marriage.—On the ground of public policy, conditions attached to gifts or bequests to a person who has never been married, if in *general* restraint of marriage, are void, i.e., the donee or legatee takes the gift or bequest whether he or she marries or not; but a condition in restraint of the second marriage, whether of a man or woman, is not void, and a condition is good if the restraint be *partial* only, e.g., if there be a bequest, with a gift over if the legatee should marry a particular person, or without a particular person's consent.²

Contracts in restraint of marriage are void. By an agreement a person cannot be bound to marry one particular person and no other.³ Marriage brokerage contracts are also void.⁴ Agreements for present and immediate separation are valid.⁵ Where monogamy is the law, an agreement by a married person made when the other spouse is still living to marry yet another person whether before or after the death of the existing spouse is void in law. If the promisee was aware of the existence of the other husband or wife as the case may be, he or she can neither enforce the agreement; nor can he or she recover damages for the breach thereof. Only where the promisee was ignorant of the promisor's other spouse, damage will lie in favour of the promisee in an action for a breach of the contract.⁶ An agreement for separation in future or for maintenance in case of separation in future is not

1. *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*, (1897) 21 Bom. 23; *In the matter of Gunput Narain*, (1876) 1 Cal. 74.

2. Wharton : *Law Lexicon*, 14th ed. 1953, 878.

3. *Lowe v. Peers* (1768), 4 Burr. 2225.

4. *Hermann v. Charlesworth*, [1905] 2 K.B. 123.

5. *Wilson v. Wilson*, [1848], 1 H.L. Cas. 538.

6. *Spiers v. Hunt*, [1908] 1 K.B. 720; *Wilson v. Carnley*, [1908] 1 K.B. 729; *Stoeyer v. Allison*, [1935] 2 K.B. 403; *Shaw v. Shaw*, [1954] 2 Q.B. 429; [1954] 2 All E.R. 638; *Wild v. Harris* (1849), 7 C.B. 999; *Millward v. Littlewood* (1850), 5 Exch. 775. See also under Section 73, *post*.

valid.¹ If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to the realities of the position. It does not, however, permit an agreement which contemplates the future possibility of so undesirable a state of affairs. Where a person has already obtained a decree *nisi* for the dissolution of his or her marriage, the *consortium* between the petitioning spouse and the respondent being over, he or she can enter into an agreement to marry with any other third person.² When, however, a breach has once occurred between the spouses and, again, they decide to live together, in the agreement, where any, they may provide for maintenance and other things should separation be necessitated once again in future.³

27. Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Exception 1—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein : Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Agreements in restraint of trade.—An agreement seeking to restrain a person from exercising a lawful profession, trade, or business of any kind is void to that extent. The expression, 'void to that extent' seems to imply that when an agreement is not fundamentally objectionable and contains provisions or have objects that are not objectionable as well as provisions with the object of restraining a person from exercising a lawful calling, it will be void in so far as it seeks to impose a restraint on the exercise of the lawful calling. Where a contract is not objectionable to the core, the void provisions may be severed from the valid ones, and the valid ones enforced. This is in consonance with the English common law on the subject. For the severability of a contract *see* under Section 24, *ante*.

An agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind is void.⁴ Even a partial restraint is void.⁵ Section 27 is intended to prevent a partial as well as a total restraint of trade. It does away with the distinction observed in the English cases

1. *H. v. W.* (1857), 3 K. & J. 382 ; *Brodie v. Brodie*, [1917] P. 271.

2. *Fender v. St. John-Mildmay*, [1938] A.C. 1 : [1937] 3 All E.R. 402.

3. *Harrison v. Harrison* [1910] 1 K.B. 35.

4. *Khurai Municipality v. Kaluram Hiralal*, A.I.R. 1944 Nag. 73 ; *Fraser and Co. v. Bombay Ice Manufacturing Co.*, (1905) 29 Bom. 107 ; *Haribhai Maneklal v. Sharafali Isabji*, (1897) 22 Bom. 861, 866.

5. *Madhub Chunder v. Rajcoomar*, (1874) 14 Beng. L.R. 76 ; *Brahmaputra Tea Co., Ltd. v. E. Scarth*, (1885) 11 Cal. 545, 549.

between partial and total restraint of trade, and makes all contracts falling within its terms void unless they fall within its exceptions.¹ A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under Section 27.²

Where the proper law of a given contract is the Indian law, foreign law will not apply.³ A clause not bad as being in restraint of trade may be severed from a clause which is so bad.⁴ Where the agreement is not divisible, it is altogether void. A reasonable restraint is not bad in law.⁵ As to what is a reasonable restraint *see* below.

The question whether an agreement is void under Section 27 must be decided upon the wording of that Section. There is nothing in the wording of Section 27 to suggest that the principle stated therein does not apply when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to the Section. Where the agreement between the parties was that for a period of three months the Laxmi Oil Mills would not place on the market in Sind any cotton husks whatever and that *D* who purchased cotton husks from the said Mills would be left a clear field to sell cotton husks in Sind during this period and *D* was to pay a sum of Rs. 2,812-8-0 to eliminate the competition of the Laxmi Oil Mills which was at least a serious competitor, it was held that the business of selling cotton husks undoubtedly was a trade or business within the meaning of Section 27 and that the case was one where the primary object of the agreement was a restrictive covenant falling within the purview of Section 27 and as such it was void to that extent.⁶ Where the agreement was in the nature of a trade combination for mutual benefit to avoid competition it was not in restraint of trade within Section 27. Where the owners of two rival businesses entered into a partnership and agreed that one business was to be stopped unless the demand exceeded a certain limit and in any case the owners were to get fixed shares in profits after deducting costs of production at a fixed rate, the agreement was held to be in the nature of a trade combination for mutual benefit to avoid competition and was not in restraint of trade within Section 27.⁷ Agreement between several firms to fix rates for ginning and baling cotton and to share profits is neither in restraint of trade nor against

1. *Nur Ali Dubash v. Abdul Ali*, (1892) 19 Cal. 765, 774.

2. *Brahmaputra Tea Co., Ltd. v. E. Scarth*, (1885) 11 Cal. 545.

3. *Oakes & Co. v. Jackson*, (1876-78) 1 Mad. 134, 145.

4. *Mackenzie v. Striramiah*, (1890) 13 Mad. 472, 474.

5. *Charlesworth v. MacDonald*, (1899) 23 Bom. 103; *Shaikh Kalu v. Ram Saran*, (1909) 13 C.W.N. 388; *Kuber Nath v. Mahali Ram*, (1912) 34 All. 587; *Auchterlonie v. Charles Bill*, (1868) 4 M.H.C. 77; *Chandra Kanta v. Parasullah*, (1921) L.R. 48 I.A. 508; (1921) 48 Cal. 1030; 65 I.C. 271.

6. *Khemchand v. Dayaldas*, A.I.R. 1942 Sind, 114.

7. *Daulat Ram v. Dharam Chand*, A.I.R. 1934 Lah. 110; *Bholanath Shankar v. Lachmi Narain*, (1931) 53 All. 316.

public policy.¹ A stipulation in a contract prohibiting any sales of goods to others, during a particular period, of a similar description to those bought under the contract, is not a stipulation in restraint of trade under Section 27.² A contract between partners of a partnership firm determining their respective rights and duties may provide that a partner shall not carry on any business other than that of the firm while he is a partner.³

An agreement entered into by an owner of land with the owner of adjoining land, to the effect that a market for the sale of cattle should not be held on the same day on the lands of both of them, is not an agreement to which the principle of Section 27 applies.⁴ A right to bid at an auction is a valuable right and unless there is any law which prevents persons from entering into agreements not to bid, such agreements *prima facie* are legal, and the consideration of the agreement could be enforced in a court of law. An agreement between two bidders whereby one agrees not to bid at an auction sale of the right to recover market dues, in consideration of Rs. 500, can be enforced, when such an agreement does not result in restraint of trade and it is not suggested that these two were the only bidders.⁵

An agreement of services by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade.⁶ A agreed on certain terms to become an assistant for three years to B, who was a physician and surgeon practising at Zanzibar. The terms contained the words "the ordinary clause against practitioner must be drawn up". Disagreement having taken place, A after a year began to practise in Zanzibar on his own account. B sued for an injunction to restrain him. B was entitled to an injunction restraining A from practising in Zanzibar on his own account during the period of three years.⁷

The term 'local limits' in Section 27 may not, in particular cases, exclude the spatial limits that seek to embrace the whole globe in their extent. 'Local', of locus, means spatial. See below.

A agreed to serve B under an agreement which provided that A should be in the exclusive employment of B for a period of three years commencing from 1 January, 1944, and that during the said term, A should not whether

1. *Kuber Nath v. Mahali Ram*, (1912) 34 All. 587; *Haribhai Manek v. Sharafali Isabji*, 22 Bom. 861; *Fraser and Co. v. The Bombay Ice Manufacturing Co.*, 29 Bom. 107 followed.

2. *Carlises, Nephews, & Co. v. Ricknauth Bucktearmull*, (1882) 8 Cal. 809.

3. Indian Partnership Act, 1932, Section 11(2).

4. *Pothi Ram v. Islam Fatima*, (1915) 37 All. 212.

5. *Mohafazul v. Babulal*, A.I.R. 1949 Nagpur 113; *Ram Lal v. Rajendra*, A.I.R. 1933 Oudh 124; 8 Luck. 233; *Jyoti Prakash v. Jhoommull*, 36 Cal. 134; 1 I.C. 784; *Bhagwant v. Gangabisan*, A.I.R. 1940 Bom. 369; (1941) Bom. 71 relied on; *Parduman v. Kashmira*, (1943) Lah. 837; A.I.R. 1943 Lah. 100 dissented from; see also *Miscellaneous cases of public policy*, Section 23, ante.

6. *Pragji v. Pranjiwan*, (1903) 5 Bom. L.R. 878; *Subba Naidu v. Haji Badsha*, (1903) 26 Mad. 168, 172.

7. *Charlesworth v. MacDonald*, (1899) 23 Bom. 103. *Macfarlane v. Kent*, [1965] 2 All E.R. 376.

he be in the employment or not, get in the employment of anyone else as a weaving master or as an employee under any title discharging substantially the same duties with any firm, individual, or company in any part of India including the then Native States for the said period of three years or any portion of the remaining period of the said term. After one year *A* left the service of *B* and entered the service of *C* as a weaving master. *B* filed a suit praying for an injunction restraining *A* from serving elsewhere in breach of the negative covenant contained in the agreement. It was held that the agreement was not unreasonably wide in restraint of trade and was therefore enforceable. Injunctions were accordingly granted in terms of the negative covenant. Illustrations (c) and (d) to Section 57 of the Specific Relief Act, 1877, in terms recognized such a contract. The contract was not against the principles of Section 27 of the Contract Act.¹ Now see Section 42 of the Specific Relief Act, 1963.

The question whether an agreement on which the suit was based was in restraint of trade within the meaning of Section 27 or not is a question of law and can be raised in second appeal.² Plaintiffs advanced money to the defendants for the purpose of carrying on work in certain mica mines, in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiffs', or keep any in stock. Plaintiffs now complained that defendants had, in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica stock. Plaintiffs prayed for and obtained an injunction restraining defendants from acting in violation of the terms of the agreement.³

A contract under which goods were purchased at a certain rate for the Cuttack market, containing a stipulation that if the goods went to Madras, a higher rate should be paid for them was construed as not one in restraint of trade.⁴

The Indian Trade Unions Act, 1926, Section 19, lays down: Notwithstanding anything contained in any other law for the time being in force, an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade provided that nothing in this Section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade

1. *Deshpande v. Aravind Mills Co. Ltd.*, A.I.R. 1946 Bombay 423; *Maganlal v. Ambica Mills, Ltd.*, A.I.R. 1964 Guj. 215; *Sunilchand v. Aryodaya Spg. & Weaving Mills Co., Ltd.*, A.I.R. 1964 Guj. 115. See also *Godavari Sugar Mills, Ltd. v. Kamgar Sabha*, A.I.R. 1961 S.C. 1016.

2. *Daylat, Ram v. Dharam Chand*, A.I.R. 1934 Lah. 110.

3. *Subba Naidu v. Haji Badsha*, (1903) 26 Mad. 168.

4. *Prejn Sook v. Dhurum Chand*, (1890) 17 Cal. 320.

Union shall or shall not sell their goods, transact business, work, employ, or be employed. Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules.¹ In England, too, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void... any agreement or trust.²

Certain Hindu workers in lead agreed not to carry on their business with the assistance of any persons not belonging to their caste. The agreement was void.³ A covenant of restraint should be designed to protect the legitimate proprietary interests of the covenantee. The law does not allow a covenant merely to avoid competition.⁴ See *Petrofina, Ltd. v. Martin*, [1965] 2 All E.R. 176.

Goodwill of business.—Goodwill of a business is the attractive force which brings in custom.⁵ It is the probability that the old customers will resort to the old place.⁶

As an abstract proposition, there can be no doubt that a particular goodwill may be local or personal or partly one and partly the other. Its character depends on the nature of the business or the circumstances.⁷

The goodwill of a business is a composite thing referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it, and in part to the likelihood of competition, many customers being no doubt attracted by mixed motives in conferring their custom.⁸ It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money.⁹

The "goodwill" of a business thus means every positive advantage as contrasted with the negative advantage that has been acquired by the old firm in carrying on its business, whether connected with the premises of the business, or its name or style, and everything connected with or carrying with it the benefit of the business.¹⁰ Often it happens that the goodwill is the

1. Section 21, *ibid.*

2. Trade Unions Act, 1871, Section 3.

3. *Vaithelinga v. Saminada*, (1878) 2 Mad. 44.

4. *Shree Gopal Paper Mills, Ltd. v. Surendra*, A.I.R. 1962 Cal. 61.

5. *I. R. C. v. Muller & Co.'s Margarine Ltd.*, [1901] A.C. 217, (*per* Lord Macnaghten at p. 224).

6. *Crutwell v. Lye*, 17 Ves. 335 (*per* Lord Eldon at p. 346); cited, *Pearson v. Pearson*, (1884) 27 Ch. D. 145 (*per* Cotton, L.J., at p. 155).

7. *Federal Commissioner of Taxation v. Williamson*, (1943) 67 C.L.R. 561 (*per* Rich, J., at p. 563).

8. *Federal Commissioner of Taxation v. Williamson*, (1943) 67 C.L.R. 561 (*per* Rich, J., at p. 564).

9. *Trego v. Hunt*, [1896] A.C. 7 (*per* Lord Macnaghten at p. 24).

10. *Churton v. Douglas*, John. 174 (*per* Wood, V.-C., at p. 188): 70 E.R. 385, 391: 28 L.J. Ch. 845. See also *Stroud's Judicial Dictionary*, 3rd ed. (1952), vol. 2, pp. 1249-52.

very sap and life of the business, without which the business would yield little or no fruit.¹

The name of a firm is a very important part of the goodwill.² The vendor of a goodwill therefore must not carry on business in the name appertaining to such goodwill, nor hold out his new enterprise as the old business.³ Nor can he object to his purchaser using the vendor's name, if it be the name, or part of the name, of the firm.⁴ But the purchaser must not use it in such a way as to hold out that the vendor remains the real owner of the business, nor so as to expose him to any liability.⁵ In *Townsend v. Jarman*, [1900] 2 Ch. 698, a purchaser bought a freehold shop with the vendor's name carved thereon, but did not use the name in his business. The vendor could not compel him to erase it.⁶ But a purchaser of a business is not entitled to use the trade name where deception would, probably, arise therefrom.⁷ In *Ginesi v. Cooper & Co.*, [1896] Ch. D. 596, Jessel, M. R., held that a trader who has sold his business and goodwill to another for value must abstain not only from soliciting orders from but also from dealing with the old customers. In an earlier case, namely, *Leggott v. Barrett*, (1880) 15 Ch. D. 306 C. A., Cotton, L. J., at page 315, however observed that in the absence of express restriction, the vendor may, notwithstanding the sale of his "goodwill" continue to deal with his old customers, though he cannot solicit them.⁸ In *Trego v. Hunt*, [1896] A. C. 7, it has been conclusively held that where the goodwill of a business is sold (without further provision) the vendor may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restricted by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor, or not to deal with the purchaser. The same principle is applicable to the case where a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner.⁹ This is so even though the old customers have already, and of their own accord, become customers of the vendor's new business.¹⁰

In *Gillingham v. Beddow*, [1900] 2 Ch. 242, one of two partners bought out the other under their articles. The articles provided that the outgoing

1. *Trego v. Hunt*, [1896] A.C. 7 (*per* Lord Macnaghten at p. 24).

2. *Churton v. Douglas*, 28 L.J. Ch. 845.

3. *Churton v. Douglas*, 28 L.J. Ch. 845.

4. *Levy v. Walker*, (1878-9) 10 Ch. D. 436 C.A. (*per* James, L.J., at p. 436).

5. *Thynne v. Shove*, (1890) 45 Ch.D. 577 (*per* Stirling, J., at p. 580).

6. See *ibid.*, *per* Farwell, J., at p. 706.

7. *Thornloe v. Hill*, [1894] 1 Ch. 569.

8. See also *ibid.*, *per* James, L.J., at p. 311 and *per* Brett, L.J., at p. 313.

9. *Labouchere v. Dawson*, L.R. 13 Eq. 322 *approved*; and *Pearson v. Pearson*, 27 Ch.D. 145 *overruled*.

10. *Curl Brothers Ltd. v. Webster* [1904] 1 Ch. 685 (*per* Farwell, J., at p. 688); *Walker v. Mottram* (1881-82) 19 Ch.D. 355 (*per* Lush, L.J., and Lindley, L.J., at p. 364); *Pearson v. Pearson*, 27 Ch.D. 145 (*per* Lindley, L.J., at p. 159).

partner might set up a similar business in the neighbourhood. The proviso was held as merely declaratory, and it did not authorize solicitation of old customers.¹

As to implying the sale of a "goodwill" without its express mention, see *Pearson v. Pearson*, 27 Ch. D. 145, and *Gray v. Smith*, 58 L. J. Ch. 805. In *Jennings v. Jennings*, [1898] 1 Ch. 378, the goodwill was not specifically mentioned in the terms of the compromise. But the relations of vendor and purchaser existed between the parties, and the ordinary obligations of a vendor were fastened upon the party. Valid agreements in restraint of trade in connection with a business pass with the sale of its goodwill,² though the word "goodwill" may not be mentioned.³

"Goodwill" is applicable to a stockbroker's business,⁴ though the said term seems inapplicable to a business which depends upon personal trust and confidence.⁵ Thus, though "goodwill" in general means the chance of being able to keep a business connected with the place where it has been carried on, it is in this sense inapplicable to the business of solicitors.⁶

Where, on a dissolution of partnership, one partner buys the "goodwill", he is entitled to all the rights passing under that word, notwithstanding that the partnership agreement provides that nothing therein contained "shall prevent either partner from starting a similar business after the expiration of the partnership".⁷ As to sale of a goodwill by the Court on a partnership winding see *Walker v. Mottram*, (1881-82) 19 Ch. D. 355; *Jennings v. Jennings*, [1898] 1 Ch. 378; *In re David and Matthews*, [1899] 1 Ch. 378 (Romer, J.); *Hill v. Fearis*, [1905] 1 Ch. 466; *Johnson v. Helleley*, 34 L. J. Ch. 179; (1864) 2 D. J. & S. 446. On compulsory alienation see *Walker v. Mottram*, (1881-82) 19 Ch. D. 355 C.A., and *Dawson v. Beeson*, (1883) 22 Ch. D. 504.

The mere assignment of a trade name unconnected with any business, being a mere assignment, is invalid.⁸ The goodwill of a business cannot be separated from it.⁹

The capital value of a goodwill is an alternative to profits, not part of them. It is the price at which a person renounces his rights to future profits. As to "profits" see *In re Spanish Prospecting Co.*, [1911] 1 Ch. 92.

In business practice, the value of the goodwill of a business is generally taken as the amount equivalent to one year's profits on the basis of an annual average for the three preceding years. The value of a goodwill, or of a

1. See *ibid.*, per Cozens-Hardy, J., at p. 244.

2. *Jacoby v. Whitmore*, 49 L.T. 335.

3. *Smith v. Hawthorn*, 76 L.T. 716.

4. *Hill v. Fearis*, [1905] 1 Ch. 466 (per Warrington, J., at p. 474).

5. *Austen v. Boys* (1858), 2 De G & J. 626; 27 L.J. Ch. 243; *Arundell v. Bell*, 52 L.J. Ch. 537; *James v. James*, 33 S.J. 366.

6. *Austen v. Boys* (1858), 2 De G. & J. 626, 636; 44 E.R. 1133, 1136 (per Lord Chelmsford, L.C.).

7. *Gillingham v. Boddow*, [1900] 2 Ch. 242 (per Cozens-Hardy at p. 244).

8. *Thornloe v. Hill*, [1894] 1 Ch. 569 (per Romer, J., at p. 577).

9. *I. R. G. v. Lebus*, (*Executors*), 173 L.T. 342.

particular aspect of it, may be taken to be that sum which, in the judgment of persons accustomed to value the particular subject-matter, a purchaser would be willing to pay for the custom attached to the business.¹ In the absence of strong indication to the contrary, a gift of an incorporeal asset such as goodwill, coupled with the gift of a number of corporeal assets, could not be construed so as to include freehold premises, and, therefore, the freehold did not pass under the bequest.²

A mortgage of hereditaments does not, generally, pass the goodwill of the business there carried on, if it be not expressly assigned.³ Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to a case where the goodwill depends on the personal skill of the owner.⁴ In *Whitley v. Challis*, [1892] 1 Ch. 64, the security did not charge the goodwill and business carried on the premises.⁵ In *In re Bennett. Clarke v. White*, [1899] 1 Ch. 316, too, the goodwill did not pass to the mortgagee by the mortgage deed.⁶ See also *Law Guarantee and Trust Society, Ltd. v. Mitcham and Cheam Brewery Co., Ltd.*, [1906] 2 Ch. 98.⁷ As to goodwill, see also below.

Agreements selling goodwill of business.—An agreement seeking to restrain a person from exercising a lawful profession, trade, or business of any kind is void to that extent. A person may however sell to another the goodwill of a business and the purchaser of the goodwill may seek to restrain the seller from carrying on a similar business within specified local limits; and the restraint thus imposed on the seller will be binding on him so long as the purchaser, or any person deriving title to the goodwill from him, carries on a like business therein. The specified local limits within which the seller will be restrained from carrying on a similar business cannot however be unlimited in their extent. The limits to be enforceable must appear reasonable to the Court, regard being had to the nature of the business sold.⁸ What the goodwill of a business is depends a good deal on the facts and circumstances of the particular business. Goodwill thus represents business representation which is a complex compound of personal reputation, local reputation, and objective reputation of the products of the business. The sale of the goodwill of a particular business may well include, in given circumstances, the monthly tenancy right or whatever right of occupation the vendor may have had in the course of the business whose goodwill is sold.⁹ The goodwill of a business is inclusive of positive advantages such as

1. *Llewellyn v. Rutherford*, L.R. 10 C.P. 456.

2. *Re Belts. Burrell v. Belts*, [1949] 1 All E.R. 568 (*per* Roxburgh, J., at p. 569). *Blake v. Shaw* (1860) 10 John. 732, 735; 70 E.R. 615, 616; 2 L.T. 84 (leasehold) (*per* Wood, V.-C.) applied.

3. Stroud: *Judicial Dictionary*, 3d edn., 1952, 1251.

4. *Cooper v. Metropolitan Board of Works*, 25 Ch.D. 472 (*per* Cotton, L.J., at p. 479-80).

5. *Per* Lindley, L.J., at p. 69; *per* Bowen, L.J., at p. 71; and *per* Fry, L.J., at p. 72.

6. *Per* North, J., at p. 321.

7. *Per* Kekewich, J., at p. 104.

8. *Chandra Kanta v. Parasullah*, (1921) 48 Cal. 1030.

9. *Dulaldas v. Ganeshdas*, A.I.R. 1957 Cal. 280.

carrying on the commercial undertaking at a particular place and in a particular name, and also its business connections, its business prestige, and several other tangible advantages which a business may acquire.¹ See also above.

By a written agreement the respondent purported to buy from the appellant the goodwill of his business of plying ferry-boats between certain places on a river, together with the interest which he had acquired by agreement for the use of landing-places and settlements for the collection of tolls at landing-places; and the appellant agreed that for three years he would not ply boats between the places in question. The appellant sued to recover the consideration agreed. It was held that the agreement was for the sale of the goodwill of a business within Exception 1 to Section 27 of the Indian Contract Act, 1872, and therefore was not void under that Section as being in restraint of trade.² Whether the defendant's conduct or position was such as would lead to his obtaining the goodwill of customers by rendering particular personal service to them is a question of fact.³

The English law of restraint of trade.—Freedom being the rule and restrictions the exception, all contracts in restraint of trade, business, service, or profession are deemed to be *prima facie* void. Thus from the point of view of presumption, a partial restraint is as much void as a general. Only reasonable restraints are held valid.⁴ The covenantee in an agreement, in case of dispute, has therefore to prove the reasonableness of the restraint sought to be imposed. Similarly, the covenantor, that is, the person restrained, in order to avoid the contract, has to prove that the covenant in question is opposed to public policy as being contrary to the interests of the public.⁵ Reasonableness or unreasonableness is a question of construction, depending on the circumstances of each case. See *Commercial Plastics Ltd. v. Vincent*, [1964] 3 W.L.R. 820 C.A.; *East Ham Borough Council v. Bernard Sunley & Sons Ltd.*, [1965] 1 All E.R. 210 C.A. See also under Section 46, *post*.

All interferences with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions. Though contracts in restraint of trade were at first a horror to the Bench, so much so that when one was produced to Hull, J., he declared it contrary to the common law and swore that had the plaintiff been present

1. *New Gujarat Cotton Mills v. Labour Appellate Tribunal*, A.I.R. 1957 Bom. 111.

2. *Chandra Kanta v. Parasullah*, (1921) 48 Cal. 1030; *Trego v. Hunt*, [1896] A.C. 7: 44, W. R. 225; *Inland Revenue Commissioners v. Muller & Co., Margarine, Ltd.*, [1901] A.C. 216 H.L.

3. *S. W. Strange, Ltd. v. Mann*, [1965] 1 All E.R. 1069 Ch.D. (*per Stamp J.*).

4. *Drapers v. Reynolds*, [1956] 3 All E. R. 814.

5. *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724, 733; *Attwood v. Lamont*, [1920] 3 K.B. 571, 587; *Palmolive Co. v. Freedman*, [1928] Ch. 264, 276; *Routh v. Jones*, [1947] 1 All E.R. 758, 763; *A. G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781, 796; *Connors Bros. Ltd., v. Bernard Connors*, A.I.R. 1941 P.C. 75.

he would have sent him to prison until he had paid a fine to the King,¹ yet now the rule is to construe the contracts and see if they are reasonable under all the circumstances of each particular case; if so, the restraint may extend over the whole life of the contractor,² and it may extend over the whole world, if (in the altered circumstances of modern times and the nature of the business) such a restriction is reasonably required for the protection of the contractee and is not injurious to the public.³

Contracts in general restraint of trade—that is, that a party shall not carry on a particular trade at all—are void on the ground of public policy, but contracts in partial restraint of trade—that is, where the restraint does not extend further than is necessary for the reasonable protection of the party for whose protection it has been agreed to—are good, if made, although by deed, for some consideration, and if not injurious to the public interests of the country.⁴ Restraints of trade may be justified by the special circumstances of a particular case. It will be a sufficient justification if the restriction is reasonable, that is, reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. The reasonableness of the restraint will be judged with reference to the particular case.⁵ An inducement of breach of restrictive covenant is actionable. See *Seflon (Earl) v. Tophams, Ltd.*, [1965] 3 All E.R. 1.

In England the law of contract being mostly a judge-made law, reference to judicial decisions is indispensable. For the English law as to contracts in restraint of trade judicial precedents are the only guide. The concept of public policy of the law being a variable one, reference to the comparatively recent judicial pronouncements becomes imperative.⁶ Even the passing of the English Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2, c. 68) covering a portion of the contracts that may be made in restraint of trade, has not rendered the role of judicial decisions any the less important.

The doctrine of reasonableness as expounded in *Nordenfelt's case*⁷ applies not only to contracts on the sale of a business, but also to a contract for service.⁸ Where the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which a restraint is reasonably necessary, an employee may be

1. Stroud : *Judicial Dictionary*, 3d ed., 1953, vol. 3, 2587.

2. *Mills v. Dunham*, [1891] 1 Ch. 576.

3. *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A.C. 535.

4. Wharton : *Law Lexicon*, 14th ed., 1953, 878-79; *S. W. Strange, Ltd., v. Mann*, [1965] 1 All E.R. 1069.

5. *Nordenfelt v. Maxim Nordenfelt*, [1894] A.C. 535, 565; *Horner v. Graves* (1831), 7 Bing. 735; *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724.

6. *Attwood v. Lamont*, [1920] 3 K.B. 571, 581; *Vancouver Malt and Sake Brewing Co., Ltd., v. Vancouver Breweries, Ltd.*, [1934] A.C. 181, 189.

7. *Nordenfelt v. Maxim Nordenfelt Co.*, [1894] A.C. 535.

8. *Underwood v. Barker*, [1899] 1 Ch. 300; *Haynes v. Doman*, [1899] 2 Ch. 13.

reasonably restrained by terms of service from competition with his master even though he may have left him.¹ Apart from the case of proprietary right, a restraint on the employee directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business will not be upheld. Thus, if a man, apart from any business, takes a covenant in gross from another that he will not trade at all, it will be invalid. Unless the protection of the legitimate interests of the employer has been the sole aim of the restraint, it will be held void. Where, again, only the interests of the covenantee are sought to be served, the restraint will be invalid. The restraint sought to be achieved must be considered reasonable by the Court in the light of the interests of both the parties as well as of the general public.²

Wherever a sufficient consideration appears to make a contract a proper and, useful one, and such as cannot be set aside without injury to the covenantee, it is maintainable in law. Where the restraint is general such as not to exercise a trade throughout the kingdom of England it is void as being of no benefit to either party or the community. Where the restraint is limited to a particular place it will be held as reasonable.³

Partial restraints, or, in other words, restraints which involve only a limit of places at which, or persons with whom, or of modes in which the trade is to be carried on, are valid when made for a good consideration, and when they do not extend further than is necessary for the reasonable protection of the covenantee.⁴ When the covenantor undertakes not to engage himself either directly or indirectly in the trade or business of the covenantee or in any business competing or liable to compete in any way with the one that is being for the time being carried on by the covenantee, the said undertaking on the part of the covenantor will not be upheld by the rule of public policy in relation to law in England. The tests to apply are: (1) is the covenant against public interest? (2) does it exceed what is required to protect the covenantor?⁵

As regards an employee in a tube-making company or other company having extensive business, the United Kingdom was not held too wide,⁶ but

1. *Hagg v. Darley* (1878). 47 L. J. (Ch.) 567; *Caribonum Co. Ltd., v. Le Couch* (1913), 109 L.T. 587; *Haynes v. Doman*, [1899] 2 Ch. 13; *Forster & Sons, Ltd., v. Suggett* (1918), 35 T.L.R. 87.

2. *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688, 710; *Townsend v. Jarman*, [1900] 2 Ch. 698, 703; *Underwood (E.) & Son, Ltd. v. Barker*, [1899] 1 Ch. 300, 305; *Tallis v. Tallis*, (1853) 1 E. & B. 391; *Haynes v. Doman*, [1899] 2 Ch. 13; *Mason v. Provident Clothing & Supply*, [1913] A.C. 724; *Leng & Co., Ltd. v. Andrews*, [1900] 1 Ch. 763, 770; *Connors Bros. Ltd. v. Bernard Connors*, A.I.R. 1941 P.C. 75.

3. *Mitchel v. Reynolds*, (1711), 1 P. Wms. 181.

4. *Maxim Nordenfelt v. Nordenfelt*, [1893] 1 Ch. 630.

5. *Fitch v. Dewes*, [1921] 2 A.C. 158; *Gledhow Autoparts, Ltd. v. Delaney*, [1965] 3 All E.R. 288.

6. *British Mannesmann Tube Co. v. Phillips*, 48 S.L. 117; but see *Leatham v. Johnstone-White*, 76 L.J. Ch. 304; *Stuart and Simpson v. Halstead*, 55 S. J. 598.

the eastern hemisphere was.¹ A radius of twenty miles round Manchester, as regards a music hall artist, was not too wide.² If the area prohibited is reasonable, the time during which the prohibition is to continue may (in some business, e. g., a solicitor's) be unlimited.³ A covenant by an employee not to carry on a competing business is not rendered invalid merely by the fact that it is entered into at the termination of the employment and not at the beginning.⁴ A wrongful dismissal is a repudiation of a contract for service and cancels an obligation therein in restraint of trade.⁵ So also if the obligee is a company and is ordered to be wound up.⁶ A covenant by a managing director, in his agreement with the company, not to solicit persons who, during the period of employment, were customers of, or in the habit of dealing, with the company, was held, in the circumstances, to be reasonable.⁷ A commercial traveller cannot be prevented from joining his employer's competitors for five years after leaving the employment; the employer can protect himself against misuse of knowledge about his customers.⁸

In a case of purchase and sale it has to be seen whether the covenant was reasonably necessary for the protection of the purchaser in respect of the business sold.⁹ A covenant by a vendor of a brewery with the purchaser, unlimited in area, not to engage in manufacturing or selling beer for fifteen years, was held unenforceable.¹⁰ Where an area restriction, defined to embrace an area in which the plaintiff company's customers were or were likely to be found, was not appropriate in view of the particular circumstances, to protect a credit betting trade connexion, but was directed to obtaining protection against legitimate competition by the defendant after his service ended, and thus purported to confer on the plaintiff company a protection that was more than adequate, it was an unlawful restraint of trade.¹¹ In *Petrofina, Ltd. v. Martin*, [1965] 2 All E.R. 176, Petrofina were not entitled to have their competitive position protected. See [1966] 1 All E.R. 126.

A contract not to bid at an auction is not against public policy.¹² A reason-

1. *Lamson Co. v. Phillips*, 91 L.T. 363.

2. *Tivoli Co. v. Colley*, 52 W.R. 632; see *Meikle v. Meikle*, 33 Sc. L.R. 362; *Ballachulish v. Grant*, 40 Sc. L.R. 791; *Barr v. Craven*, 89 L.T. 574.

3. *Connors Bros. Ltd. v. Bernard Connors*, A.I.R. 1941 P.C. 75; Stroud: *Judicial Dictionary*, 3d ed., 1953, vol. 3, 2587; see *Jacoby v. Whitmore*, 49 L.T. 335; *Woodbridge v. Bellamy*, 55 S.J. 126.

4. *Spink (Bournemouth), Ltd. v. Spink*, [1936] Ch. 544.

5. *General Billposting Co. v. Atkinson*, [1909] A.C. 118 H. L. (E.).

6. *Measures v. Measures*, [1910] 2 Ch. 248.

7. *Gilford Motor Company, Ltd. v. Horne*, [1933] Ch. 935.

8. *J.W. Chafer v. Lilley*, [1947] L.J.R. 231; *Gledhow Autoparts, Ltd. v. Delaney*, [1965] 3 All E.R. 288.

9. *British Cement Co. v. Schelff*, [1921] 2 Ch. 563.

10. *Vancouver v. Vancouver*, [1934] A.C. 181.

11. *S. W. Strange, Ltd. v. Mann*, [1965] 1 All E.R. 1069 Ch.D. (*per Stamp, J.*).

12. *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635.

able contract regulating prices is not invalid as being in restraint of trade.¹ An agreement by a retailer to sell only one wholesaler's ice-cream has been held valid.² The doctrine avoiding a contract which in effect deprives a man of the means of supporting himself and his family was affirmed in *King v. Michael Faraday & Partners, Ltd.*, [1939] 2 K. B. 753.

Where two Companies entered into an agreement by correspondence that they would not without the written consent of the other at any time employ any person who during the then past five years should have been a servant of the other, the agreement was void as being in restraint of trade.³ In a covenant in restraint of trade the words "carry on or be engaged or interested in any business similar to or competing with the business of the partnership" are apt to include a case where the party subject to the restriction takes employment in a business of either of the kinds mentioned at a salary or wages, as well as a case in which he may embark on such a business on his own account or in a partnership.⁴ Where the restriction as to space was reasonable, it could not be held to be unreasonable because there was no limit as to time.⁵ As to solus agreement, see *Esso Petroleum v. Harper's Garage*, [1965] 2 All E.R. 933. *Petrofina v. Martin*, [1966] 1 All E.R. 136.

Further cases on restraint of trade.—*Prima facie*, all restraints, whether total or partial, are void. Any restraint may be upheld, if it is not wider than is reasonably necessary for the protection of the covenantee and is not against the public interest. In *Thorston Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company, Ltd.*, [1894] A.C. 535 H.L. (E.), the covenant though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers, wider than was necessary for the protection of the company, nor injurious to the public interests of England⁶; it was therefore valid and might be enforced by injunction. In *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724 H.L. (E.), the restriction was wider than was reasonably necessary for the plaintiffs' protection. In *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688 H.L. (E.), the covenant was wider than was required for the protection of the plaintiff company and was therefore unenforceable. See also *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.*, [1959] Ch. 108, C.A., *per* Jenkins, L.J., at 117, 120. In *Birtley & District Co-operative Society Ltd. v. Windy Nook & District Co-operative Society*, [1960] 2 Q.B. 1, the restriction was on the trading activities of one Society. As the contract was indeterminate in point of time, the onus was on those who alleged that it was impliedly limited. A contract in restraint of trade

1. *Elliman v. Carrington*, [1901] 2 Ch. 275; *Palmolive Co. v. Freedman*, [1928] Ch. 264; 44 T.L.R. 86.

2. See *Peters American Delicacy Co. v. Patricia's Chocolates and Candies*, [1947] 77 C.L.R. 574.

3. *Kores Manufacturing Co., Ltd. v. Kolok Manufacturing Co., Ltd.*, [1957] 3 All E.R. 158.

4. *Ronbar Enterprisers, Ltd. v. Green*, [1954] 2 All E.R. 266 C.A.; [1954] 1 W.L.R. 815.

5. *Connors Bros. Ltd. v. Bernard Connors* (a case from Canada), A.I.R. 1941 P.C. 75.

6. *Nordenfelt v. Maxim Nordenfelt*, [1894] A.C. 535 H.L. (E.)

cannot be enforced unless (a) it is reasonable as between the parties, and (b) it is consistent with the interests of the public.¹ *Whitehill v. Bradford*, [1952] Ch. 236 C.A., was a case of a partnership agreement between four doctors. The area prohibited was not more than was reasonably required for the protection of the interests in question. The covenant was therefore enforceable. In *General Billposting Co. v. Atkinson*, [1909] A.C. 118 H.L. (E.), a manager as an employee was wrongfully dismissed by his employers. He was by that employers' own wrongful act absolved from a covenant not to compete with them. The manager was entitled to treat the dismissal as a repudiation of the contract and to sue them for damages for breach of contract, and was no longer bound by the restriction on trade. As to resale price maintenance in England, see Resale Prices Act, 1964.²

The onus lies on the covenantee, to prove that the restraint is good.³ In *Fitch v. Dewes*, [1921] 2 A.C. 158, 162 H.L. (E.), the covenant though unlimited in point of time, did not in the circumstances exceed what was reasonably required for the protection of the covenantee and was not against the public interest. The onus was on the covenantor to prove that the restraint was bad.⁴ For onus see also *Goldsoll v. Goldman*, [1914] 2 Ch. 603; [1915] 1 Ch. 292. The onus of proof that a restraint is against the public interest is heavy.⁵

As to severability of the various provisions in a contract in restraint of trade see *Attwood v. Lanont*, [1920] 3 K.B. 571, 580 C.A., (per Younger L.J.); *Jenkins v. Reid*, [1948] 1 All E.R. 471 C.D.; and *Drapers (a firm) v. Reynolds*, [1957] 1 W.L.R. 9 C.A. (master and servant).

The (English) Restrictive Trade Practices Act, 1956.—"The Board of Trade may, upon the representation of the registrar, give directions authorizing him to remove from the register particulars of such agreements of which particulars are for the time being entered therein as appear to the Board to be of no substantial economic signification."⁶

In the Chancery Division the Court makes declarations on construction only when the matter has been argued by counsel on each side and has been the subject of adjudication. But so far as the Restrictive Trade Practices Act, 1956, is concerned a declaration can follow from the statutory presumption under Section 21(1) in the absence of defence.

Under Section 21(1) of the Act, restrictions are deemed to be contrary to the public interest unless the tests laid down by that sub-section are satisfied.⁷

1. *Korres v. Kolok*, [1959] 1 Ch. 108 C.A., cited above.

2. *Regent Oil Co., Ltd. v. Aldon Motors, Ltd.*, [1965] 2 All E.R. 644.

3. *Herbert Morris, Ltd. v. Saxelby*, [1916] A.C. 688 H.L. (E.) (page 706, per Lord Parker of Waddington); *Routh v. Jones*, [1947] 1 All E.R. 758 C.A. (covenant by a doctor).

4. Per Lord Birkenhead.

5. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co., Ltd.*, [1955] 1 W.L.R. 761, 767; [1955] 2 All E.R. 657, 662 H.L. (per Viscount Simonds).

6. Section 12(1), *ibid*.

7. *Re British Constructional Steel-Work Association's Agreement*, [1959] 1 All E.R. 428 (Restrictive Practices Court).

The Court shall have jurisdiction, on application made in accordance with Section 20 in respect of any agreement of which particulars are for the time being registered under the Act to declare whether or not any restrictions by virtue of which the Act applies to the agreement (other than restrictions in respect of matters described in paragraphs (b) to (d) of Section 8(8) of the Act), are contrary to the public interest.¹

An application under Section 20(1) may be made in any case by the registrar.² For the purposes of any proceedings before the Court under Section 20, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the Court is satisfied of any one or more of the following circumstances, that is to say, . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . . (e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated;³ (f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume of earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry.⁴ Under Section 21, 'purchasers', 'consumers', and 'users' include persons purchasing, consuming, or using for the purpose or in course of trade or business or for public purposes.⁵

When on a reference by the Registrar of Restrictive Trading Agreements the restrictions are not found justifiable on the ground that their removal would deny the public specific and substantial benefits within paragraph (b) and substantially reduce exports of the goods concerned within paragraph (f) of Section 21 (1) of the Restrictive Trade Practices Act, 1956, the restrictions will be held as being opposed to public policy and therefore void.⁶ When a

1. *Re The Yarn Spinners' Agreement*, [1959] 1 All E.R. 299 (Restrictive Practices Court); Section 20(1), *ibid.*

2. Section 20(2) (a), *ibid.*

3. Section 21(1), *ibid.*; *Re The Yarn Spinners' Agreement*, [1959] 1 All E.R. 299 (Restrictive Practices Court).

4. *In re Federation of British Carpet Manufacturers' Agreement*, [1960] 1 W.L.R. 356 (Restrictive Practices Court).

5. Section 21(2), *ibid.*

6. *In re Federation of Wholesale and Multiple Bakers' (Great Britain and Northern Ireland) Agreement*, [1960] 1 W.L.R. 393 (Restrictive Practices Court).

case under paragraph (b) of Section 21(1) of the Act cannot be established, the restrictions are declared contrary to the public interest.¹

When a restriction is deemed by Section 21(1) of the Act to be contrary to public interest it will be rendered void by Section 20(3) thereof. Where any such restrictions are found by the Restrictive Practices Court to be contrary to the public interest in respect of those restrictions;... the Court may...make such order as appears to the Court to be proper for restraining all or any of the persons party to the agreement...from giving effect to...the agreement in respect of those restrictions...²

Though there had been a long history of control over the price of bread, yet the control had been exercised by authorities outside the industry; and an appeal to history, without analysis of comparative conditions, was not a real help in determining an issue under the Restrictive Trade Practices Act, 1956.³

After Section 25 of the (English) Restrictive Trade Practices Act, 1956, came into force on November 2, 1956, the plaintiffs stated on their price lists that goods marketed by them were sold subject to observance on resale of the fixed retail prices published in their current price list. The defendants, being aware of this condition, purchased from a wholesaler an article sold by the plaintiffs and sold it at less than the fixed retail price. An injunction would be granted against breach of the condition by the person so acquiring the goods.⁴

Two co-operative societies, registered under the (English) Industrial and Provident Societies Act, 1893, and members of a co-operative union similarly registered, were in dispute as to their respective trading rights in a certain area, and submitted the dispute to arbitration under the rules of the union. These rules provided that one of the objects of the union was to act as arbiters in disputes between member societies, and that any disputes relating to overlapping should be submitted to arbitrators appointed by it, whose decision should be final and binding. The rules also provided that any member of the society might withdraw from the union by a written notice sent to its office. The award on the arbitration forbade trading in a certain area to one of the societies, which refused to comply and subsequently withdrew from the union. It was held that on the society's withdrawal from the union the award ceased to bind it. It was unreasonable to suppose that a society joining the union and agreeing to submit its freedom of trading to

1. *In re Phenol Producers' Agreement*, [1960] 1 W.L.R. 464.

2. Section 20(3), *ibid.*; *Re Water-Tube Boilermakers' Association's Agreement*, [1959] 3 All E.R. 257 R.P.C.

3. *Re Scottish Association of Master Bakers' Agreement. Re Wholesale and Retail Bakers of Scotland Association's Agreement*, [1959] 3 All E.R. 98 (Restrictive Practices Court).

4. *County Laboratories, Ltd. v. J. Mindel Ltd.*, [1957] 1 All E.R. 806.

arbitration, intended to bind itself for all time, whether or not it continued a member.¹

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Agreements in restraint of legal proceedings void.

Exception 1.—This Section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Savings of contract to refer to arbitration dispute that may arise.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Suits barred by such contracts.

Exception 2.—Nor shall this Section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

Ouster of jurisdiction of a court of law.—Under the English common law, a deed purporting to oust the jurisdiction of the English courts is void as being contrary to public policy. It will however not be void under the English common law if it purported to oust the jurisdiction of a foreign court.² Section 28 of the Indian Contract Act prohibits any agreement between the parties which divests the courts of their inherent jurisdiction and debars the parties from going to a court of law.³ Litigants cannot by

1. *Bellshill and Mossend Co-operative Society, Ltd. v. Dalziel Co-operative Society, Ltd.*, [1960] 2 W.L.R. 580 H.L.

2. *Addison v. Brown*, [1954] 2 All E.R. 213.

3. *Afanoharlal v. Kalyanmalji*, A.I.R. 1955 M.B. (Indore) 145; *State of Bihar v. Rama Bhusan*, A.I.R. 1964 Patna 326.

agreement *inter se* divest a Court of its inherent jurisdiction over the subject-matter of suit any more than they can confer jurisdiction on it by consent, where it has none.¹ An agreement between litigants seeking to confer jurisdiction upon a Court which it does not possess or seeking to divest a Court of its jurisdiction which it possesses under the ordinary law is thus void.² The parties may however expressly exclude legal liability.³

In *Chittaranjan v. Parul Rani*, (1946) 1 Cal. 257 : A.I.R. 1946 Cal. 112, the contract contained, *inter alia*, the terms that any legal action resulting from it would be taken in the Courts at Calcutta. The terms consequently implied that any legal action arising out of the contract would be taken at Calcutta Court though normally the Courts at Calcutta and Dacca would both have jurisdiction. The effect of the agreement was therefore to prevent the parties absolutely from filing a suit in the Court at Dacca and as such the contract was construed as falling under Section 28.⁴ Even if the agreement was not void, Henderson, J., observed, it would be putting the matter rather too high to say that the agreement had taken away the jurisdiction from the Court at Dacca. The fact that a party willingly made the agreement persuaded the Court to take the view that such an agreement might afford a ground for transfer. The expression "absolutely" in Section 28 has thus left some scope for a divergence of judicial opinion.⁵ In *Dwarka Rubber Works v. Chhotalal*, A.I.R. 1956 M.B. (Gwalior) 120, it was observed that an agreement confining the parties to have recourse to only one of the several competent courts may not be within the mischief of Section 28 of the Indian Contract Act but, if permitted, may defeat the provisions of law as laid down under Section 20 of the Civil Procedure Code. Such agreement is hit by Section 23, clause 2, of the Contract Act, and being unenforceable, cannot be pleaded in bar of action in one of such courts. Where both the Courts have jurisdiction to try a suit and the parties come to an agreement that the suit should be tried by one Court, but the other Court holding that it has jurisdiction tries the merits of the case between the parties, it was held not to be proper

1. *Jagan Nath v. Burma Oil Co. Ltd.* 1929 Lah. 605 : 119 I.C. 481 ; *Kidri Prasad v. Khosala*, A.I.R. 1923 Lah. 425 : 75 I.C. 590 ; *National Petroleum Co. v. Rebello*, A.I.R. 1935 Nag. 48 : 157 I.C. 315 ; *Union of India v. Feroze & Co.*, A.I.R. 1962 J. & K. 66.

2. *Continental Drug Co. Ltd. v. Chemoids and Industries, Ltd.*, A.I.R. 1955 Cal. 161 ; *Ahmed Kunju v. Hanuman Industries*, A.I.R. 1956 T.C. 200 ; *Ram Bahadur v. Devidayal (Sales) Ltd.*, A.I.R. 1954 Bom. 176 ; *Kaliyappa & Sons v. Currimbhoy & Co.*, A.I.R. 1954 T.C. 461 ; *Gairda Lal v. Rameshwar*, A.I.R. 1937 All. 650.

3. *Rose & Frank Co. v. Crompton & Bros., Ltd.*, [1925] C.A. 445 ; *Jones v. Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626 ; *Appleson v. Littlewood, Ltd.*, [1939] 1 All E.R. 464.

4. *Kidri Prasad v. K.R. Khosala*, A.I.R. 1923 Lah. 425 : 75 I.C. 590 ; *Jagan Nath v. Burma Oil Co.*, A.I.R. 1929 Lah. 605 : 119 I.C. 481 ; *Radha Kishen v. Bombay Company Ltd.*, A.I.R. 1943 Lah. 295 ; the Lahore cases have been overruled in *Musa Ji v. Durga Dass*, (F.B.) (1945) Lah. 281 : A.I.R. 1946 Lah. 57 : 223 I.C. 284 ; *Ramnicksal v. Vivekanand Mills Co. Ltd.*, (1945) 49 C.W.N. 58.

5. *Ramnicksal v. Vivekanand Mills Co. Ltd.*, (1945) 49 C.W.N. 58 ; *Dhanmal v. Jankidas*, (1945) 49 C.W.N. 123.

for the revisional Court to interfere and entail fresh hardship on both parties.¹ As against this view there are a large number of decisions holding that "absolutely" in Section 28 means absolutely. According to these decisions, Section 28 prevents parties from divesting Courts of their inherent jurisdiction and makes void only those agreements which *absolutely* restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But it has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a limitation of the choice of forum which the law has conferred upon him and to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried.² The validity of an agreement by which the parties prefer one of the two Courts depends upon the fact that both the Courts must have jurisdiction in deciding the matter.³ There is nothing against public policy in an agreement between the parties that a suit regarding disputes arising between them would be instituted in one only out of several competent Courts having territorial jurisdiction. So long as the case is heard by a competent Court which has jurisdiction in every way to hear it, there is nothing in public policy which dictates that, because other Courts which can also hear the same cannot hear it in view of the agreement, that is a matter against public policy.⁴ The parties may by a contract prefer one of the several competent Courts.⁵ Where there are two Courts which are equally competent to try a suit, an agreement between the parties that the suit would

1. *Gopal Das v. Hari Kishan*, A.I.R. 1936 All. 514.

2. *Musa Ji v. Durga Dass*, (F. B.) A.I.R. 1946 Lah. 57; *Radha Kishen v. Bombay Company Ltd.*, A.I.R. 1943 Lah. 295; 212 I.C. 411 *overruled*; *National Petroleum Co. Ltd. v. Meghraj*, (1939) Nagpur 641; A.I.R. 1937 Nagpur 334; *Achrattal v. Vijayam & Co.*, A.I.R. 1925 Mad. 1145; *Tilakram v. Kodumal*, A.I.R. 1928 Bom. 175; *Lakshminivas Mills Co. v. Vinayak*, A.I.R. 1935 Bom. 198; *Milton & Co. v. Ojha Automobile Engineering Co.*, 57 Cal. 1280; A.I.R. 1931 Cal. 279; 130 I.C. 252; *Libra Mining Works v. Baldota Bros.*, A.I.R. 1962 Andhra 452; *Swedish East Asia Co. Ltd. v. Herman & Mohatta (India) Private Ltd.*, A.I.R. 1962 Cal. 601.

3. *Amritsar Transport Co., Ltd. v. Sohanlal*, A.I.R. 1957 J. & K. 7.

4. *Musa Ji v. Durga Dass*, (F. B.) (1945) Lah. 281; A.I.R. 1946 Lah. 57.

5. *Ram Bahadur v. Devidayal (Sales) Ltd.*, A.I.R. 1954 Bom. 176; *Kaliyappa & Sons v. Currimbhoy & Co.*, A.I.R. 1954 T.C. 461; *Motandas & Co. v. Hakumat Rai*, A.I.R. 1955 J. & K. 26; *National Petroleum Co. Ltd. v. Meghraj*, (1939) Nag. 641; A.I.R. 1937 Nag. 334; *Gopal Das v. Hari Kishan*, (1936) A.L.J. 704; A.I.R. 1936 All. 514; 163 I.C. 919; *Khandesh Lakshminivas Mills Co. v. Vinayak Atmaram*, 37 Bom. L.R. 157; A.I.R. 1935 Bom. 198; 156 I.C. 277; *Milton & Co. v. Ojha Automobile Engineering Co.*, 57 Cal. 1280; A.I.R. 1931 Cal. 279; 130 I.C. 252; *Achrattal Kesavalal v. Vijayam & Co.*, 49 M.L.J. 189; A.I.R. 1925 Mad. 1145; 90 I.C. 1019; *Haji Abdulla v. G.R. Stamp*, 26 Bom. L.R. 224; A.I.R. 1924 Bom. 381; 80 I.C. 523; *Raghavayya v. Vasudevayya*, A.I.R. 1944 Mad. 47; *Balwant Singh v. Mian Mohd.*, A.I.R. 1947 Pesh. 48; *Beni Pershad v. Narayan Glass Works*, A.I.R. 1949 Ajmer 19; *Bhagat Ram v. Ramniwas*, A.I.R. 1949 Ajmer 44; *Sharma v. Sunder Talkies Distributors*, A.I.R. 1944 Oudh 275; *Ahmed Kunju v. Hanuman Industries*, A.I.R. 1956 T.C. 200; *Hoosen Kasam Dada (India) Ltd. v. Motilal Padampat Sugar Mills Co. Ltd.*, A.I.R. 1954 Mad. 845; *Manuel Raj & Co. v. Manilal & Co.*, A.I.R. 1963 Gujarat 148; *New India Assurance Co. v. Nanjunda*, A.I.R. 1964 Mys. 147.

be instituted only in one of those two Courts cannot be said to be an absolute restriction on the right of taking legal proceedings in the ordinary tribunals but is only a partial restriction on such rights. Such an agreement does not contravene the provisions of Section 28 if the Court chosen has had jurisdiction to try the suit under the ordinary law.¹ Restricting the choice of place of suing does not amount to taking away absolutely his right to sue at all. The use of the word 'absolutely' in the Section makes such a construction imperative. Hence, where the Courts at Mandvi and Bombay have ordinary jurisdiction to try a suit, but the parties contract to sue only at Bombay, the Court at Mandvi cannot entertain the suit filed by one of the parties to the contract.²

Covenants in a bill of lading limiting the jurisdiction in respect of disputes to a foreign Court do not contravene the provisions of Section 28 especially when the said foreign Court has had the jurisdiction to try the suit under the ordinary law.³ Where a bill of lading in respect of goods shipped at Naples provided that a claimant under the bill had to summon the shipping company before the Courts at Trieste or Genoa in Italy renouncing the competence of any other judicial authority the Court will stay a suit instituted in India in breach of such agreement and compel the plaintiff to institute legal proceedings at Trieste or Genoa unless good cause is shown. Grounds must be put forward by the party who relies on the bill of lading, to show that he is not bound by the clause in the bill and that the Courts at Trieste and Genoa will have no jurisdiction because the goods were shipped at Naples.⁴ An agreement by the parties to confine the settlement of their disputes to one of two Courts having jurisdiction does not oust the jurisdiction of the Court which is excluded by the agreement but may be a ground for staying the suit. Thus where by mutual consent the parties had confined the settlement of their disputes to one of the two Courts having jurisdiction, namely, the Court in Calcutta and the Court in Rangoon, they did not oust the jurisdiction of the other Court from entertaining the suit. The chosen forum not being available for an indefinite period because of Japanese invasion and occupation it was thought unreasonable to stay the suit instituted in Calcutta Court and refer the parties to the forum to which they had agreed.⁵

From the foregoing discussion of case law it is clear that only an agreement by which any party thereto is restricted *absolutely* from enforcing his rights

1. *Continental Drug Co. Ltd. v. Chemoids and Industries, Ltd.*, A.I.R. 1955 Cal. 161.

2. *Unique Motor and General Insurance Co. Ltd. v. Rayma*, A.I.R. 1950 Kutch 32; *Hoosen Kasam Dada (India) Ltd. v. Motilal Padampat Sugar Mills Co. Ltd.*, A.I.R. 1954 Mad. 845.

3. *Lloyds Triestino Societa v. Lakshminarayan*, A.I.R. 1959 Cal. 669; *Motabhai v. Mahaluxmi Cotton Mills*, 91 C.L.J. 1; *Marittima Italiana v. Rustomji*, 54 Bom. 278; A.I.R. 1930 Bom. 185 *relied on*.

4. *Lakshminarayan Ramniwas v. Compagnia Genovese D' Esportazione*, A.I.R. 1960 Cal. 545; *Swedish East Asia Co. Ltd. v. Herman & Mohatta (India) Private Ltd.*, A.I.R. 1962 Cal. 601.

5. *Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd.*, A.I.R. 1949 Cal. 390; *Ramnicksal v. Vivekanand Mills*, 49 C.W.N. 58; *Dhanmal v. Jankidas*, 49 C.W.N. 123; *Chittaranjan v. Parul Rani*, A.I.R. 1946 Cal. 11.

under or in respect of any contract by the usual legal proceedings in the ordinary tribunals is void. Where however the restriction has not been an absolute one but only partial in its scope the agreement will not be void but a valid one. It is submitted that an agreement seeking to impose a partial restraint, though a valid one, will be enforceable only at the discretion of the Court whose jurisdiction has been sought to be ousted. That is to say, an agreement of partial restraint is valid but not necessarily enforceable. It will depend on circumstances whether the 'ousted' Court will extend its recognition to the agreement of partial restraint. On the defence of the plea of a valid agreement of a partial restraint ordinarily the plaintiff's suit will be stayed or transferred to the forum accepted by both the parties.¹ Only such a synthesis may supply a unified solution of the conflicts. The plaintiff-appellant as the holder of three bills of lading instituted a suit against the steamship company Lloyd Triestino Societa as also its agents, claiming a sum of Rs. 15,154.06 nP. on the allegation that 22 bundles of Mild Steel Round bars were shortlanded at the port of Calcutta. Each of the bills of lading contained the following clause:

"All requests for compensation in respect of damage, shortage, deterioration, loss of goods loaded shall be submitted for friendly settlement to the agencies of the shipping company at the place of discharge, failing a friendly agreement, both the shipper and the receiver as well as any other party interested in the cargo, if intending to take legal steps against the company, for the above mentioned causes and in general for whatsoever other causes may summon them before Judicial Authorities of Trieste or Genoa hereby expressly renouncing the competence of any other Judicial Authority. No exception must be made to this exclusive competence even if the company is sued partly (defendant) by reason of connection or contingency of the law suits."

The contracts contained in the bills of lading were held as governed by the Italian law which was the proper law of the contract in the instant cases.

Clause 31 of each of the bills of lading, cited above, though valid as a contractual stipulation, could not be pleaded as a bar to the jurisdiction of an Indian Court which otherwise had had jurisdiction to try a suit instituted before it. When however the attention of the Court in which the suit was instituted was drawn to a contractual stipulation of this kind, the Court might in the exercise of its discretion stay its hands and refuse to try the suit until the competent judicial authority to whose decision the parties have agreed to submit their disputes had pronounced its decision.

The Court acts upon the principle that in general the Court will compel the parties to abide by their contracts. Instead of driving the defendant to a separate suit to enforce the covenant, the Court may for the purpose of preventing multiplicity of litigation enforce the contract summarily on an

1. See *Ramnicklal v. Vivekanand Mills Co. Ltd.*, (1944) 49 C.W.N. 58, 62.

application made to it in the suit instituted before it. The *prima facie* leaning of the Court is that the contract should be enforced and the parties should be kept to their bargain. Subject to this *prima facie* leaning, the discretion of the Court is guided by considerations of justice. The balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law which governs the contract, the connection of the dispute with the several countries and the facilities for obtaining evenhanded justice from the foreign Tribunal are all material and relevant considerations. If on a consideration of all the circumstances of the case the Court comes to the conclusion that it will be unjust or unfair to stay the suit, the Court may refuse to grant the stay asked for.¹

An agreement concerning a pending suit cannot amount to an adjustment of the suit so as to bar further proceeding in the trial.² An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not bar him from subsequently claiming a trial of the suit on its merits. Subject to certain well-known exceptions, when the Court is seized of a case, it has jurisdiction to decide it in the manner prescribed by law, and the parties have no right to interfere with its authority to do so.³ A bond contained the stipulation: "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way." It was held that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in the country, they might admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of endorsement was a circumstance of some importance, which ought not to be overlooked, but was by no means conclusive.⁴ An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings, etc., and the transferee shall not in any way enforce his rights under the transfer, e.g., execute or intervene in execution is void under Section 28 of the Contract Act.⁵ An agreement not to appeal against a decree is not a void agreement and is not prohibited by Section 28.⁶ Where, in consideration of *A* giving *B* time to satisfy a decree against him held by *A*, *B* agreed not to appeal against the decree and did appeal, it was held that the agreement was not prohibited by Section 28, and that the appellate Court was bound by the rules of justice, equity and good conscience to give effect to it and to refuse to allow *B* to

1. *Lakhinarayan v. Lloyd Triestino Societa*, A.I.R. 1960 Cal. 155.

2. *Moyan v. Pathukutti*, (1908) 31 Mad. 1.

3. *Raja of Venkatagiri v. Chinta Reddy*, (1914) 37 Mad. 408.

4. *Narayan Undir Patil v. Motilal Ramdas*, (1876-77) 1 Bom. 45.

5. *Muthiah Chettiar v. Govindoss Krisnadoss*, (1921) 44 Mad. 919.

6. *Bhirgunath v. Annappurna*, A.I.R. 1934 Patna 644.

proceed with the appeal which he had instituted in contravention of it.¹ The adjustment of a decree out of Court, if never certified to the Court, is, under Section 258, C. P. C., ineffectual only so far as the execution of the decree is concerned; there is nothing in the Contract Act to make such an adjustment invalid as the consideration of an agreement; an agreement founded on such consideration may be enforced without defeating the objects of Section 258.² A *mashahara patra* read: "You (grantee) shall not be entitled to allow the allowance so fixed to remain in arrears for more than one year. As soon as it is in arrear for one year, you will realize the same by suit. You shall not be able instead of doing so to institute a suit for realizing arrears for two or three years together." The restriction was void.³ In *Chiranji Lal v. Union of India*, A.I.R. 1963 Punjab 372, it has been observed that disputes as to the legal validity of the arbitration agreement and as to the existence of facts which render it illegal and void must be determined by the Court and not by the arbitrator. Award registered but not made rule of court is ineffective.⁴

The United Nations.—The United Nations possesses juridical personality having capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.⁵ The United Nations is competent to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.⁶

See also the (English) United Nations Act, 1946. The (English) Statute Revision Act, 1963 (1963, c. 30) repealed the words, "but notwithstanding" onwards in Section 1(4) of the United Nations Act, 1946.

Agreements limiting time for action.—An agreement seeking to limit the time within which a party may enforce his rights under or in respect of a contract by the usual legal proceedings in the usual courts of law is void. The law of limitation for suits cannot thus be abrogated by a party to an agreement. A party will not be estopped from pleading the statutory period of limitation even though he had agreed to bring an action, if need be, within a particular time. The parties can neither extend the period of limitation nor curtail it by an agreement *inter se*. A party by an agreement cannot contract himself out of his statutory rights of limitation. The expression 'restricted absolutely' has no reference to an agreement which seeks to limit the time within which a party may enforce his rights under or in respect of

1. *Anant Das v. Ashburner, & Co.*, (F.B.) (1876-78) 1 All. 267.

2. *Ramghulam v. Janki Rai*, (1885) 7 All. 124.

3. *Saroj Bandhu v. Jnanada*, A.I.R. 1932 Cal. 720.

4. *Rambilas v. Durga Bijai*, A.I.R. 1965 Patna 239.

5. Sections 2 and 3 of the United Nations (Privileges and Immunities) Act, 1947 (Act 46 of 1947); see also The Schedule, *ibid*. See also Article I, Section 1 of the Convention on the Privileges and Immunities, adopted by the General Assembly of the United Nations on the 13th day of February, 1946.

6. See Article VIII, Section 29 of the Convention on the Privileges and Immunities, adopted by the General Assembly of the United Nations on the 13th day of February, 1946.

any contract by the usual legal proceedings in the ordinary tribunals. Even a partial curtailment or expansion of one's statutory rights under the law of limitation is void and unenforceable.¹ Parties cannot estop themselves from pleading the statute of limitation. An agreement by a debtor not to raise the plea of limitation is void.² Parties cannot by contract alter the statutory period of limitation. Nor can they alter the starting point of limitation. Such a contract will be void.³ It has been rightly observed in *Governor-General in Council v. Badri Das*, A.I.R. 1951 All. 702, and *Dominion of India v. Rupchand*, A.I.R. 1953 Nagpur 169, that it is not open to the Railway Administration to repudiate its liability for loss or damage to the goods if the claim is not made immediately to the clerk in charge of the station to which they had been booked and is not forwarded to the Traffic Manager forthwith, because the observation of such a rule would be contrary to the provisions of law relating to limitation for suits. Clause 4 of the rules printed at the back of the railway receipt under which the consignments are booked, requiring all claims in this respect to be made to the clerk in charge of the station is a rule of guidance and not a rule of law. There are several decisions holding the contrary view. In *Western India Prospecting Syndicate Ltd. v. Bombay Steam Navigation Co. Ltd.*, A.I.R. 1951 Sau. 83, for example, it was held that where a condition in a bill of lading only exempted the company from liability in case a notice of the claim was not given within fourteen days from the due date, the condition was not void as it did not restrain a party absolutely from making a claim in a court of law in respect of the loss or damage. As noted before, absolute restraint in Section 28 does not refer to the right of limitation. The decision does not therefore appear to be tenable. In *Ruby General Insurance Co. Ltd. v. Bharat Bank, Ltd.*, A.I.R. 1950 E.P. 352, a clause in a fire insurance policy provided: "In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration." It was held by Kapur, J., that a limitation placed by the terms of a policy during which a claim could be made or after which excepting in certain circumstances the liability of the insurer would cease was not a condition which was void either under the Contract Act or under the Limitation Act. Kapur, J., was obviously wrong in that the impugned clause sought to limit the time within which the assured might enforce his rights under the policy. In *Pearl Insurance Co. v. Atma Ram*, A.I.R. 1960 Punjab 236, a Full Bench decision of the Delhi Bench of the Punjab High Court, a clause in an insurance policy read: "In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration." According to their Lordships, the clause in question did not limit the time within which the insured could

1. Cf. Section 37 of the Arbitration Act, 1940.

2. *Ballapragada v. Thammana*, (1917) 40 Mad. 701.

3. *Jawahar Lal v. Mathura Prasad*, (F.B.) A.I.R. 1934 All. 661.

enforce his rights and only limited the time during which the contract would remain alive and as such was not hit by the provisions of Section 28 of the Contract Act. Their Lordships in the *Pearl Insurance* case were as much beside the point as Kapur, J., in *Ruby General Insurance* case. The wordings in the respective clauses were so obviously opposed to the rule laid down in Section 28 of the Contract Act that the point of view taken by their Lordship is utterly untenable. Once a right has accrued in favour of the assured, the right of its realization cannot be confined to an agreed period of time in contravention of the general law of the land.¹ In spite of this reasonable rule, there have been a number of decisions, as seen before, holding the contrary view. In *Haji Shakoor Gany v. Hinde & Co.*, 34 Bom. L.R. 634; A.I.R. 1932 Bom. 330; 138 I.C. 793, the effect of a clause in a bill of lading was that the rights of the plaintiffs would be extinguished in respect of the claim made after one year, and the clause was held valid. In *Nathu Mal v. Ram Sarup & Co.*, 12 Lah. 692; A.I.R. 1932 Lah. 169, it was observed that a clause in a contract providing that no claim or dispute of any sort whatever could be recognized if not made in writing within 60 days from due date of payment did not take away the statutory right of a plaintiff to bring his claim within the time prescribed by law.

Baroda Spinning and Weaving Co. Ltd. v. Satyanarayan Marine and Fire Insurance Co. Ltd., (1914) 38 Bom. 344, was one of the decisions that appear totally untenable. There the S. Insurance Co. granted a policy of insurance against fire to the B. Co. on certain property of the latter, the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection all benefit under the policy should be forfeited. Damage was caused to the property of the B. Co. thus insured and a claim was made by that company of the S. Insurance Co. which was rejected by the latter. More than three months after such rejection the B. Co. filed a suit against the S. Insurance Co. to recover the amount of their claim. It was observed by Sir Basil Scott, C.J., that there was a distinction between the extinction of a right and the loss of a remedy, that Section 28 of the Contract Act was aimed only at covenants not to sue at any time and at covenants not to sue for a limited time, that a conditional release or forfeiture was a very different thing from a covenant not to sue although to avoid a circuitry of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of Section 28 of the Contract Act.² Batchelor, J., observed: "As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that

1. *Hirabhai v. Manufacturers' Life Insurance Co.*, (1912) 14 Bom. L.R. 741 (a case of a life policy).

2. *Ibid.*, 353.

appears to me to be a very different thing.”¹ In *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha*, (1909) 36 Cal. 516, the policy of insurance contained, *inter alia*, the condition, “That in the event of loss:—(a) The Manji or Charandar must report to the nearest Police Station within 24 hours and must state that the cargo is insured....(f)...that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the terms of six months next after any loss or damage shall occur... the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.”

The clauses (a) and (f) were conditions precedent: the fact that the condition in clause (a) might be impossible of fulfilment could not affect the liability.

Their Lordships observed that the term “warranty” as used in a policy of Marine Insurance was used to devote two different kinds of conditions: (i) a condition to be performed by the assured, and (ii) an exception from or limitation on the general words of the policy. In the first case the warranty was a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right² to sue thereon, or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes, or limits the period for bringing a claim: in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness, and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived.³

To repeat, a clause in an insurance policy reading: “In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months (or fourteen or sixty days, etc.) from the happening of the loss or damage unless the claim is the subject of pending action or arbitration”, “the rights of the plaintiffs (the assured) will be extinguished in respect of the claim made after one year...”, “no claim or dispute of any sort whatever can be recognised if not made in writing within sixty days from due date of payment”, “if a claim were made and rejected and an action or

1. *Ibid.*, 356; see also *Girdharilal v. Eagle, Star and British Dominions Insurance Co.*, (1923) 27 C.W.N. 955: 80 I.C. 637; *G. Rainey v. B. F. and M. Insurance*, (1925) 3 Rang. 383: 91 I.C. 622: A.I.R. 1926 Rang.

2. See also *New Asiatic Insurance Co. Ltd., v. Bihar State Co-op. Bank Ltd.*, A.I.R. 1966 Patna 69.

3. *South British Fire and Marine Insurance Co. v. Brojo Nath Shaha*, (1909) 36 Cal. 516; *Girdharilal v. Eagle Star Insurance Co.*, A.I.R. 1924 Cal. 186; *Mylappa v. British India Steam Navigation Co. Ltd.*, (1918) 34 M.L.J. 553.

suit were not commenced within three months after such rejection all benefit under the policy should be forfeited," "no suit or action of any kind against the said company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the terms of six months next after any loss or damage shall occur... the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced", or the like, obviously militates against the provisions of Section 28 of the Indian Contract Act inasmuch as such a clause seeks to limit the time within which the assured might enforce his rights under or in respect of the contract of insurance by the usual legal proceedings in the ordinary tribunals of the land and is therefore void. The difference between a clause limiting the time within which the assured was to enforce his rights and a clause limiting the time within which he was to have rights to enforce appears to be as thin as that between tweedledee and tweedledum. Secondly, what if the insurer does not take any action on the claim of the assured or if he does not refer the claim to arbitration? Obviously, the insurer cannot be left as the sole arbiter of the assured's claims. Thirdly, it will be for the court to decide as to whether a given clause embodies a warranty purported to be a condition precedent to the policy, that is, whether it is precedent to the effectual making of the policy or precedent to the accrual of the assured's right to sue thereon. Where however the so-called warranty seeks to declare the events in which forfeiture of the assured's rights ensues or deals with the mode of settling disputes or limits the period for bringing a claim the Court will see whether the impugned clause violates the statutory provision of Section 28 of the Contract Act, or is opposed to the public policy of the law or whether it is an unreasonable clause in an otherwise valid contract of insurance. The law would certainly not allow operativeness to a clause in the contract of insurance reading: "no suit or action of any kind against the insurer for the recovery of any claim... shall be sustainable in any court of law or equity unless such suit or action shall be commenced within the terms of ten years next after any loss or damage shall occur..." If an extension of the law of limitation was not to be countenanced, why a curtailment? The phrase "restricted absolutely" in the first paragraph of Section 28 does not refer to the time within which the assured may enforce his rights. The full course of time within which the assured may enforce his rights is thus left 'untouchable' by the express provision of Section 28 of the Contract Act. If the contention of Batchelor, J., Basil Scott, C. J., or Kapur, J., to cite only a few of the several learned Judges, namely, that what the assured had done in the instant cases was to limit the time within which he was to have any rights to enforce and not to limit the time within which he was to enforce his rights is accepted, then, the cart is put further before the horse in that the period of limitation is sought to be extended by deferring the starting point of the period of limitation which extension the law will not allow. The learned Judges

Moreover, the agreement for arbitration will continue to be governed by any provision of any law in force for the time being as to references to arbitration. See Sections 46 and 47 of the Arbitration Act, 1940. See also Order XXIII, Rule 3, and Order XXXIII, Rule 7, of the Code of Civil Procedure, Section 14 of the Specific Relief Act, 1963, and Section 289 of the Companies Act, 1956.

Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.¹ Where the Arbitration Act, 1940, had no application, Section 21 of the Specific Relief Act, 1877, was the remedy for the defendant. Now see Section 14 of the Specific Relief Act, 1963. A party to a reference can sue the other party for breach of the agreement. He may sue him for damages for the breach.

The statutory or inherent jurisdiction of the Court in respect of a contract or the subject-matter of a contract cannot be excluded by an agreement between the parties.² Thus, neither a general agreement to submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitrator, nor even the pendency of an arbitration thereon, can be pleaded in answer to a claim in an action.³ The parties are allowed in law to bind themselves by the finding of facts by an arbitrator, but an agreement seeking to bind the parties that the finding of an arbitrator on a question of law should also be binding on them is not enforceable.⁴ The arbitrators, unless expressly otherwise authorized, have to apply the laws of the country. In England, it has been provided in the Arbitration Act, 1950, that arbitrators may ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance. Under the said Act the Courts may require the arbitrators, even if unwilling, to state cases for the opinion of the Court on the application of a party to arbitration if the Courts think it proper. The citizens are not allowed, as a rule of public policy, to agree to exclude this safeguard for the due administration of the law. The parties are allowed, however, to have a binding agreement to the effect that they will not go to law before an award has been made by an arbitrator as stipulated in the contract. The law does not prevent two persons from agreeing that a cause of action shall arise only when a contingency has happened or a condition has been performed; but when a cause of action has once arisen upon the happening of the contingency or the performance of the condition, a party cannot by an agreement exclude himself or the other party from the

1. Section 21 of the Arbitration Act, 1940.

2. *Thompson v. Charnock* (1799), 8 Term Rep. 139; *Bennett v. Bennett*, [1952] 1 K.B. 249; [1952] 1 All E.R. 413; *Hyman v. Hyman*, [1929] A.C. 601.

3. *Doleman & Sons v. Ossett Corporation*, [1912] 3 K.B. 257.

4. *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, 1181; *Baker v. Jones*, [1954] 2 All E.R. 553; *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478.

maintenance thereof.¹ In *Baker v. Jones and ors.*, [1954] 2 All E.R. 553, one of the rules of an unincorporated association vested its government in a central council. Another rule provided: "The decision of the central council in all cases, and under all circumstances, shall be final." It was held that the relationship between the members was contractual, the contract being contained in, or implied from the rules; it was also held that while a tribunal or council could by such a contract be made the final arbiter on questions of fact, the parties could not prevent its decisions on questions of law (such as the interpretation of the rules of the association concerned) being examined by the Courts, and accordingly the rule or rules seeking to oust the jurisdiction of the Court were contrary to public policy and void. The discretion of the Court to set aside the award on any valid ground cannot be controlled by an agreement between the parties to accept the award without any objection whatsoever.²

A contract which stipulates that the decision of the arbitrator shall be final and conclusive and which thus bars the jurisdiction of the ordinary tribunals from examining the validity of the award is void, and notwithstanding that clause, the Courts would have jurisdiction to examine the validity of the award in a properly framed proceeding. The contract to refer to arbitration is not void because that of itself could not have the effect of ousting the jurisdiction of the Courts.³

A defence to the effect that an agreement was never entered into or that it was void for some reason is a matter exclusively for the determination of the Court and not of the arbitrator, because if the existence or validity of the entire agreement itself is denied, and if this denial is found to be correct the arbitration clause goes along with the other parts of the agreement.⁴

Where a suit was filed against four different defendants of whom one alone was a party to the arbitration agreement and he applied for stay of the suit, the suit could not be stayed inasmuch as the other defendants were no party to the arbitration agreement. In the absence of any cogent reasons, the suit could not be stayed even against the defendant who had been a party to the arbitration agreement because that would mean the trial of a suit piecemeal which procedure is considered undesirable and unfair.⁵

It is open to the parties to a contract to agree in advance that no right of action shall arise thereon until the matters in controversy have been referred to and ascertained by an arbitrator appointed in accordance with the terms of the contract. The Court in such a case will give effect to the agreement unless the condition precedent has been removed under the powers conferred on the Court by the Arbitration Act or unless the Court comes to the con-

1. *Scott v. Avery* (1856), 5 H.L. Cas. 811.

2. *Abdul Majid v. Bahawal Bakhsh*, A.I.R. 1950 Lah. 174; *Burla Ranga Reddi v. Kalapalli Sithaya*, (1883) 6 Mad. 368.

3. *Union Construction Co. v. Chief Engineer*, A.I.R. 1960 All. 72.

4. *Godhu v. Ganga*, A.I.R. 1958 All. 26.

5. *Bajrang Electric Steel Co. v. Commissioners for the Port of Calcutta*, A.I.R. 1957 Cal. 240.

clusion that the right to arbitration has been waived either by express agreement to do so or by an express refusal to exercise it or by a failure or neglect to arbitrate or by participating without objection in a trial of the controversy on its merits or by omitting to demand arbitration within a reasonable time, or by obstructing or delaying the arbitration proceedings or by repudiating liability under the principal contract. If the liability is repudiated on grounds which go to the root of the contract and it is contended that the agreement is void, the party repudiating the liability cannot insist on the observance of the arbitration clause.¹ A reference to arbitration of the subject-matter of a pending action without an order of Court is within the contemplation of the proviso to Section 47 of the Indian Arbitration Act, 1940. Such a reference involves ouster or, at any rate, suspension for the time being of the Court's jurisdiction to proceed with the trial of the suit and is opposed to public policy and as a contract it is unenforceable under the law of contract. Further, an award otherwise obtained within the meaning of the proviso to Section 47, cannot *ipso facto* work as an accord and satisfaction of the suit. It must be acquiesced in or agreed to be treated as such after it is made. Consequently, an award obtained on an agreement for reference to arbitration between the parties during the pendency of a suit and without any order from the Court cannot be treated as an adjustment of the suit under Order XXIII, Rule 3, of Civil Procedure Code, *ipso facto* and without a fresh consent between the parties given after the award.²

The above view taken by the High Court of Orissa in *Indramoni v. Nilamoni*, A.I.R. 1950 Orissa 169, seems to be fortified by the public policy of the law as well as the provisions of Section 28 of the Contract Act and Section 21 and Section 47, inclusive of the proviso, of the Arbitration Act, 1940. The reasoning of their Lordships in *Subbaraju v. Venkatramaraju*, 51 Mad. 800 : 113 I.C. 632 · A.I.R. 1928 Mad. 1025, a Full Bench decision, as well as in *Arumuga v. Balasubramania*, (1946) Mad. 39 : A.I.R. 1945 Madras 294, does not appear to be in consonance with the provisions of Section 28 of the Contract Act or Section 47 of the Arbitration Act, 1940. In *Subbaraju v. Venkatramaraju*, the Full Bench of the High Court at Madras held that where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Order XXIII, Rule 3 of the Code of Civil Procedure, though the parties do not accept the award. Following the said Full Bench decision, Leach, C.J. and Lakshmana Rao, J., of the said High Court in *Arumuga v. Balasubramania* held that an award made in a private arbitration during the pendency of the suit could be treated as an agreement for compromise and on that basis a decree could be passed in the

1. *Newzealand Insurance Co. Ltd. v. Nagpal Hosiery Factory*, A.I.R. 1955 Punjab 113 : *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 ; *Macaura v. Northern Assurance Co.*, [1925] A.C. 619 ; *Jureidini v. Millers Insurance Co.*, [1915] A.C. 499 ; *Cooverji v. Bhimji*, (1882) 6 Bom. 528 ; *C. Kessler v. Coringa Oil Co. Ltd.*, (1876) 1 Cal. 42, 51, 466.

2. *Indramoni v. Nilamoni*, A.I.R. 1950 Orissa 169.

terms of the award. Section 47 of the Arbitration Act, 1940, was inserted, their Lordships thought, by the Legislature in order to allow the Court unfettered action under Order XXIII, Rule 3, of the Code of Civil Procedure. Section 47 of the Arbitration Act, 1940, observed their Lordships, did not preclude an award in a private arbitration being made a decree of the Court unless all the parties interested in it had, after the award had been given, consented to a decree being passed in the terms thereof. An agreement to accept a future award, their Lordships proceeded further, could be treated as a compromise in the suit, and the Arbitration Act of 1940 in no way altered the position. The proviso to Section 47 of the Arbitration Act, 1940, it is submitted, requires the existence of an award actually made and the consent of all the parties interested given subsequent to the existence of the award in question in order to enable a Court to take into consideration such award as a compromise or adjustment of a suit pending before it. In *Jugal Das v. Pursottam*, A.I.R. 1953 Cal. 690, also it was held that like other arbitration agreements a contract in writing to refer to arbitration matters in dispute in a suit, while the suit is pending, is legal. Such contract does not oust the jurisdiction of the Court and is not in restraint of legal proceedings. Section 21 of the Arbitration Act, 1940, presupposes that such contract is legal and that its subject-matter is lawful.

The view of the Orissa High Court though standing alone seems to be based on a better reasoning. In the circumstances the question awaits a pronouncement of the Supreme Court for its solution.

As the rules of a body to which the agreement of arbitration refers should be deemed to have been incorporated in the contract by virtue of the agreement of the parties, it has necessarily to be held that on a matter of procedure the relevant factors should be the rules as existing at the time of the reference and not at the genesis of the contract.¹

When a reference is made to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, the association has power to appoint individuals to act as arbitrators and the rules of the association will be binding on the parties.²

The plaintiff who was a subscriber of a telephone executed a telephone-hiring contract in respect of that telephone in favour of the Governor-General. One of the terms of the contract read: "If any dispute shall arise touching the effect of this contract or in any way relating thereto... the same shall be referred for decision to the Director-General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties." The agreement was valid. The reference to the arbitration of the Director-General was not a bad reference merely by reason of the fact

1. *Hussain Kasam Dada v. Vijayanagaram Commercial Association*, A.I.R. 1954 Madras 528; *Ramnarein v. Liladhur*, 33 Cal. 1237; 10 C.W.N. 814; *Chaitram v. Bridhichand*, (1915) 42 Cal. 1140.

2. *Ganges Manufacturing Co. v. Indra Chand*, (1906) 33 Cal. 1169; *Champsey v. Gill & Co.*, (1905) 7 Bom. L.R. 805.

that he happened to be the head of the department which was responsible for hiring the telephone connection to the plaintiff or because of the fact that the Director-General was a servant of the Central Government of India.¹ The Manager of the Calcutta Tram Co. was validly made a sole judge.² The Deputy Commissioner could be made an arbiter where the Secretary of State for India was a party.³ Section 56 of the Specific Relief Act, 1877, contemplated injunctions directed to the Court itself and did not prevent any Court from making an order *in personam* forbidding an individual from proceeding in another Court.⁴ Now see Section 41 of the Specific Relief Act, 1963. Before Section 21 of the Specific Relief Act, 1877, could be relied upon, it had to be shown that the plaintiff had refused to refer to arbitration; and the filing of the plaint was not such a refusal.⁵ Now see Section 14 of the Specific Relief Act, 1963. To invoke an arbitration clause the defendant must also establish that the agreement is still operative.

Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence reference to arbitration can be made in pursuance of the arbitration clause.⁶ The arbitration clause in a contract can be regarded as a thing apart from the main conditions of a contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals only with the procedure for determining liabilities created by the contract, and the arbitration clause itself creates no liability. It only embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such a dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Act. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement.⁷

1. *Central Government of India v. Chhotatalal*, A.I.R. 1949 Bom. 359; *Secretary of State v. Saran Bros. & Co.*, 8 Luck. 98; A.I.R. 1932 Oudh 265; *Aghore Nauth v. Calcutta Tramways Co. Ltd.*, 11 Cal. 232; *Jackson v. Barry Railway Co.*, [1893] 1 Ch. 238; 68 L.T. 472; *Ives and Barker v. Williams*, [1894] 2 Ch. 478; 63 L.J. Ch. 521; *Erkersley v. Mersey Docks and Harbour Board*, [1894] 2 Q.B. 667; 71 L.T. 308.

2. *Aghore Nauth v. Calcutta Tram, Co. Ltd.*, (1885) 11 Cal. 232.

3. *Secretary of State v. Saran Bros. & Co.*, A.I.R. 1932 Oudh 265.

4. *Milton & Co. v. Ojha Automobile Engineering Co.*, (1930) 57 Cal. 1280.

5. *Koomud Chunder v. Chunder Kant*, (1880) 5 Cal. 498.

6. *Tahal v. Hisheshar*, (1885) 8 All. 57; *Sheoambar v. Deodat*, (1886) 9 All. 168.

7. *Karam Narain v. Volkart Bros.*, (F.B.) A.I.R. 1946 Lah. 116; *Heyman v. Darwins Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337; 111 L.J.K.B. 241; 166 L.T. 306.

Section 32 of the Arbitration Act, 1940, does not apply to an award under the Arbitration (Protocol and Convention) Act, 1937. An award under the Protocol Act is not an award under the Arbitration Act, 1940, but is, for purposes of enforcement, only deemed or treated as such award.¹ For "foreign award" (which means an award on differences relating to matters considered as commercial under the law in force in India) see The Arbitration (Protocol and Convention) Act, 1937 (Act 6 of 1937). See also Sections 46, 124, 125 and 143 of the Companies Act, 1956.

29. Agreements, the meaning of which is not certain, or Agreements void for capable of being made certain, are void. uncertainty.

Illustrations

(a) *A* agrees to sell to *B* "a hundred tons of oil". There is nothing whatsoever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) *A* agrees to sell to *B* one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) *A*, who is a dealer in cocoanut-oil only, agrees to sell to *B* "one hundred tons of oil". The nature of *A*'s trade affords an indication of the meaning of the words, and *A* has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) *A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) *A* agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

Uncertain agreements.—An agreement the meaning of which is not certain or capable of being made certain is void. *A* agrees to sell to *B* a hundred tons of oil. There is nothing whatever to show what kind of oil was intended to be sold. The agreement is void for uncertainty. If the oil to be sold was of a specified description, known as an article for the particular commercial intercourse, there would be no uncertainty and as such the agreement would not be void. If, again, the seller was a dealer only in a particular kind of oil, the uncertain phrase 'one hundred tons of oil' in the circumstances would mean one hundred tons of that particular kind of oil alone, and the contract would not be void for uncertainty. *A* agrees to sell to *B* all the grain *A* has had in his granary at Ramnagar. The agreement suffers from no uncertainty and is therefore enforceable. *A* agrees to sell to *B* one thousand maunds of rice at a price to be fixed by *C*. The price being capable of being made certain, there is no uncertainty in the agreement rendering it void, that is, unenforceable. *A* agrees to sell to *B* his white horse for Rs. 500 or Rs. 1,000. The price to be paid not being capable of being made certain, the agreement is void. The purpose of Section 29 is to ensure that the parties to contract should be aware of the

1. *Pratibmull v. Sethia*, A.I.R. 1960 Cal. 702.

parties. It was held that the words "for the time being" were ambiguous and it was not clear whether they referred to the "Circle" or to the "Superintending Engineer". Even if the expression "Superintending Engineer of the Circle" was to be taken collectively it was not clear whether it was the person who held that office at the time of the institution of the suit or the person holding the office when the cause of action arose that was to be the arbitrator. The words in the agreement were too vague and indefinite and the agreement was unenforceable for want of certainty.¹ It will be submitted that *Daulat Ram v. Sate of Punjab*, A.I.R. 1958 Punjab 19, seems to be the better view. In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate, when necessary, their disputes before the arbitrators and seek their decision on these points of differences. In what circumstances a particular arbitration agreement will be vague and uncertain and therefore unenforceable will be a question of fact in the case in question.²

Where by a deed of assignment the goodwill as well as the assets of a business are transferred, there is no vagueness in the description of the property transferred.³

As a rule, a person would not agree to pay any sum as rent until the lease has actually commenced to run its course. Thus, the agreement that the rent should be paid on a certain date in advance would import that the term of the lease started to run from that date and the document cannot be said to be uncertain and incomplete even though the lease did not specify the date of commencement.⁴ Where a written contract for sale of land is silent about the price and the time for performance, the contract is not void for uncertainty, if it is one that can be made certain within the meaning of Section 29. If on evidence it is found that the parties agreed to the payment of a reasonable and fair price and complete the contract within reasonable time the Court can imply such terms in the contract and determine what is reasonable price and what is reasonable time.⁵ In an ordinary contract to sell immovable property the personality of the purchaser is not usually material. It is sufficient if the identity of the purchaser is ascertainable. It is not necessary to utter the actual name unless the personality is an essential part of the contract. Thus, where a reputed and well-known firm of solicitors writes to say that one of their clients is willing to purchase the property, there is no scope for dispute about the identity of the purchaser and there is no difficulty in ascertaining as to who the purchaser is, so as to

1. *Governor-General in Council v. Simla Banking and Industrial Co. Ltd.*, A.I.R. 1947 Lah. 215.

2. *Radha Kishan v. Sapattar Singh*, A.I.R. 1957 All. 406.

3. *Devji v. Karsandas*, A.I.R. 1954 Patna 280.

4. *U. P. Government v. Nanhoo Mal*, A.I.R. 1960 All. 420; *Wesley v. Walker*, (1878) 38 L.T. (N.S.) 284; *Sandill v. Franklin*, (1875) 10 C.P. 377.

5. *Rajkishor v. Banabehari* A.I.R. 1951 Orissa 291.

either make the contract uncertain on that ground or unenforceable by specific performance.¹ Where the terms of a contract of guarantee, though oral, have been mentioned with sufficient precision in plaint, the contract cannot be held to be uncertain or void within the meaning of Section 29.² Specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run.³ When a reference is made to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, the association has power to appoint individuals to act as arbitrators and the rules of the association will be binding on the parties.⁴ Where certain persons, describing themselves as residents of J. give a bond for the payment of money in which, as collateral security they charge "their property" with such payment, they do not thereby create a charge on their immovable property situated in J.⁵ An agreement in a *patta* to pay whatever rent the landlord may impose for any land not assessed which the tenant may take up is bad for uncertainty.⁶ Gifts or contracts expressed to be for maintenance and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie*, they are limited to the life either of the grantor or grantee.⁷ A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal is a contract which is capable of specific performance. Such a contract is not void for uncertainty.⁸ The use of the words "approximating to" did not render the terms of the agreement too vague to be enforceable.⁹ Where the Court could decide whether any condition or covenant required by the lessor was reasonably required, a clause that "The lease shall contain such other covenants and conditions as shall be reasonably required by" the lessor did not make the agreement too vague to be enforceable.¹⁰

Evidence of what took place after the execution of a document is not admissible on the question of its construction.¹¹ No contract is void merely because no time for performance is specified. There are many kinds of contracts in which no time for performance is fixed.¹² The terms of the agreement as to repayments of a certain amount were indefinite; but the

1. *Gostha Bahari v. Surs' Estates, Ltd.*, A.I.R. 1960 Cal. 752.

2. *Suresh Narain v. Akhauri*, A.I.R. 1957 Patna 256.

3. *Giribala v. Kalidas*, A.I.R. 1921 P.C. 71-73.

4. *Ganges Manufacturing Co. v. Indra Chand*, (1906) 33 Cal. 1169.

5. *Deojit v. Pitambar*, (1876-78) 1 All. 275.

6. *Ramasami v. Rajagopala*, (1888) 11 Mad. 200.

7. *Karim Nensey v. G. K. Heinrichs*, (1901) 25 Bom. 563.

8. *Secretary of State v. Volkart Brothers*, A.I.R. 1927 Mad. 513.

9. *Edwards v. Skyways, Ltd.*, [1964] 1 All E.R. 494 Q.B.D.

10. *Sweet & Maxwell, Ltd. v. Universal News Services, Ltd.*, [1964] 3 All E.R. 30 C.A.

11. *Vissanji Sons and Co. v. Shapurji Burjorji*, (1912) 36 Bom. 387 P.C.

12. *Mahomed Jan v. Fazal Uddin*, (1924) 46 All 514 : 85 I.C. 482 : A.I.R. 1924 All. 657, 658.

uncertainty was not pleaded as a bar to its legality and repayments were made by one party and accepted by the other towards the agreement without protest. It was held that the agreement was not void for uncertainty.¹ A mortgage of all the indigo cakes that might be manufactured by the mortgagor's factory from the crops to be grown on lands of the factory from the date of the mortgage up to the date of payment of the mortgage debt was not vague in its terms. The description of the property mortgaged was sufficient, and thus there was no vagueness to hinder equity from enforcing the contract.² An agreement which is uncertain or opposed to the rule against perpetuities will be void.³ By a written contract, the contractor undertook to execute such repairs and constructions as might be ordered by the municipal engineer from time to time during the period of one year; he was to be paid at the rates enumerated in the schedule of rates sanctioned by the Municipal Board. Details or specifications of the items of works that might be ordered by the municipal engineer during the said period were not given in the contract. The contract was valid.⁴ Where the sellers by a letter confirmed that "if necessary" they would carry over the contracted goods for two months subject to payment of charges, the agreement was not void for uncertainty.⁵ Where the renewal clause in a deed of lease read: "on such terms and conditions as may be agreed to between the parties", it was construed as uncertain and vague and thus being incapable of forming a valid contract of renewal of the lease.⁶ In *Dasarath v. Satyanarayan*, A.I.R. 1963 Cal. 325, two deeds formed really part of one and the same transaction.⁷ In the context, "other necessary and indispensable expenses" was not an expression uncertain enough to make the contract void for uncertainty.

A contract to reconvey in favour of four persons is not void for uncertainty though the person or persons to exercise first option was not determinable.⁸

Ambiguous words in a covenant are to be taken most strongly against the covenantor.⁹

30. Agreements by way of wager are void; and no suit shall be brought for recovering any thing alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Agreements by way of wager void.

1. *Indraraj v. Chaitram*, A.I.R. 1929 Nag. 194 ; *Venkayyamma v. Appa Rao*, 39 Mad. 509 : 43 I.A. 138 P.C. : A.I.R. 1916 P.C. 9 relied on.

2. *Baldeo Parshad v. A. B. Miller*, (1904) 31 Cal. 667.

3. *Aulad Ali v. Ali Athar*, (1927) 49 All. 527 ; *Mahomed Jan v. Fazl Uddin*, (1924) 46 All. 114 : 85 I.C. 482 : A.I.R. 1924 All. 657.

4. *Municipal Board, Agra v. Ram Lal*, (1936) 58 All. 1069.

5. *Dhanrajmal Gobindram v. Shamji Kalidas and Co.*, A.I.R. 1961 S.C. 1285.

6. *Hikarini Sabha v. Jabalpur Corporation*, A.I.R. 1961 M.P. 324.

7. See also *Sitarama v. Venkatarama*, (F.B.) A.I.R. 1936 Mad. 261.

8. *Kanakasabapathi v. Govindarajulu*, A.I.R. 1964 Mad. 219.

9. *Dasarath v. Satyanarayan*, A.I.R. 1963 Cal. 325.

This Section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Exception in favour of certain prizes for horse-racing.

Nothing in this Section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294-A of the Indian Penal Code apply.

Section 294-A of the Indian Penal Code not to be affected.

Gaming and wager.—The term gaming, strictly used, means playing a game, whether of chance or skill, for stakes hazarded by the players. The mutual promises which the players necessarily make, expressly or by implication, in playing for a stake, as to its transfer upon the result of a game, form a gaming contract.¹ Such a contract may itself be a wager; but this will only be so if the parties or sides to the contract are limited to two, since a wager is necessarily, but a gaming contract not necessarily, a bipartite agreement. If therefore there are more than two parties to an arrangement under which stakes contributed by players are to change hands as the result of a game, this is a gaming contract, but not a wager or a series of wagers.²

Agreements by way of wager.—An agreement by way of wager is void.³ No suit will lie for recovering anything alleged to be won on any wager. Neither will a suit lie for recovering anything entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. This last mentioned provision may mean either of two things: It may mean that the winner on any wager cannot enforce the recovery of the prize even when the prize has been entrusted to any stakeholder. It may also mean that even the person depositing a prize or money with the stakeholder to abide the result of any game or other uncertain event on which a wager has been made cannot recover it from the stakeholder even when the prize or money has not been handed over. There is no conflict between the winner's disability and the depositor's disability in the matter of recovery. The depositor's disability to recover the thing or money entrusted with the stakeholder even before the latter has parted with it is in conflict, it will be seen, with the English common law on the subject. The Legislature having chosen to prescribe a provision of law more rigorous than that obtaining in England, no objection can be raised to the comparative severity of the Indian law. The judges in England have chosen, it will be seen, to grant the depositor a *locus poenitentiae* enabling him to withdraw the thing or money deposited with the stakeholder before it has been handed over. A notice

1. *Earl of Ellsmere v. Wallace*, [1929] 2 Ch. 1 C.A. 38, 39.

2. *18 Halsbury's Laws*, 3rd edn., 168, para. 336. See also below.

3. *Rajaram v. Shah Kapers Firm*, A.I.R. 1964 Andhra 537.

given to the stakeholder by the depositor before the money or thing has been handed over to the winner is sufficient in England to hold the stakeholder liable for the money or thing deposited. The wording of Section 30 of the Indian Contract Act leaves no scope to the Court here in India to enable the depositor to repent and withdraw his stake before it has been handed over by the stakeholder to the winner.

Wagering contracts.—A wagering contract is one by which two persons, professing to hold opposite views, stake something of value upon the ascertainment of the truth concerning some past or present event or upon the issue of a future uncertain event. There cannot be more than two parties or two sides to a bet. When there is a multipartite agreement for a bet, in the very nature of a wagering contract, the numerous parties will be deemed to be divided into two sides, of which one wins or the other loses, according to whether an uncertain event does or does not happen or according to whether the truth concerning the past or present event has been ascertained or not. The two parties must mutually agree that dependent upon the ascertainment of the said truth or the determination of the said uncertain event, one shall win from the other, and that other shall pay a sum of money or any other given stake. Each party stands equally to win or lose the stake.¹ The chance of gain or the risk of loss is not one-sided only. Apart from the stake, neither party has any other interest in the contract, there being no other real consideration for the making of such contract by either of the parties.² It is only the presence of the stake and the absence of any other interest that renders a contract a wager. In construing a contract with a view to determining whether it is a wagering contract or not, the Court will receive evidence in order to arrive at the substance of it, and will not therefore confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of a language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract.³ Thus, the question which a Court has to try is whether the transaction in question was a real bargain or whether it was simply a gambling transaction intended to end in the loss or gain of the stake. Where in a transaction for sale or purchase of stock, the intention was that the transaction would end in the payment of differences only on the settling day it would be a wagering one. If, on the

1. *Sassoon v. Tokersey*, (1904) Bom. 616; *Dayabhai Tribhovandas v. Lakhmichand*, (1885) 9 Bom. 358.

2. *Thacker v. Hardy* (1878), 4 Q.B.D. 685; *Carlill v. Carbolic Smoke Ball Company*, [1892] 2 Q.B. 484, 490; *Lockwood v. Cooper*, [1903] 2 K.B. 428; *A.-G. v. Luncheon and Sports Club, Ltd.*, [1929] A.C. 400, 407; *Ellesmere v. Wallace*, [1929] 2 Ch. 1, 24, 36, 48; *Pannalall v. Lal Chand*, A.I.R. 1960 Cal. 261; *Walyti Ram v. Bhagwan Dass*, A.I.R. 1960 Punjab 471.

3. *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484, 491; *Brogden v. Marriott* (1836), 3 Bing. (N.C.) 88; *Rourke v. Short* (1856), 5 E. & B. 904; *Grizewood v. Blane* (1852), 11 C.B. 538; *Thacker v. Hardy* (1878), 4 Q.B.D. 685; *Weddle, Beck & Co. v. Haskett*, [1929] 1 K.B. 321; *Woodward v. Wolfe*, [1936] 3 All E.R. 529; *Ironmonger & Co. v. Dyre* (1928), 44 T.L.R. 497, 499; *Diggle v. Higgs* (1877), 2 Ex. D. 422; *Trimble v. Hill* (1879), 5 App. Cas. 342.

other hand, the party as seller or purchaser of the stock meant to receive or invest the money in the sale or purchase of the stock which he ordered to be sold or purchased, it would be a perfectly legitimate and real business transaction. That is to say, if he did not mean to hand over or take up the stock but only meant to purchase or sell them again before the settling day arrives it would be a gambling transaction if both the parties to it had the same gambling intention.¹

The essential feature of a wagering contract is that the only interest which the parties have in the contract is the winning the stake. Sales and purchases of commodities or of stocks and shares are not wagering transactions in the absence of an agreement between the parties that they should not be actually carried out but should end only on the payment of differences.²

An insurance for a term of years on the life of a person in which the insurer has no interest is void as a wagering contract under Section 30 of the Contract Act.³ Where the cardinal feature of the chit fund in suit was that lots were drawn for prizes monthly and that the winners got Rs. 50, the full amount of the chit, without any liability for further subscription and after the 50th drawing, the unsuccessful subscribers got back the full amount of their subscriptions but without interest, it was held that the chit fund was not a wagering contract and there was no objection to enforce its terms in a court of law.⁴

A contract containing stipulation to pay difference between contract price and market price in the event of breach of contract by either party may

1. *Universal Stock Exchange, Ltd. v. Strachan*, [1896] A.C. 166, 167; *Motilal Partabchand v. Govindram Jeychand*, (1906) 30 Bom. 83; *Sassoon v. Tokersey*, (1904) 28 Bom. 616; *Jessiram Juggonath v. Tulsidas Damodar*, (1913) 37 Bom. 264.

2. *Bullion and Grain Exchange Ltd. v. State of Punjab*, A.I.R. 1961 S.C. 268; *Sheo Narain v. Bhallar*, A.I.R. 1950 All. 352; *Shanti Lal v. Madan Lal*, A.I.R. 1954 All. 789; *Buddulal v. Shrikishan Chandmal*, A.I.R. 1961 M.P. 57 (Indore); *Nand Kishore v. Lachi Narain*, A.I.R. 1954 Raj. 24 (Jaipur); *Hasanali v. Ratilal*, A.I.R. 1953 Sau. 141; *Sitaram v. Chamanlal*, A.I.R. 1952 Hyderabad 95; *Narayan v. Alleppey Chamber of Commerce*, A.I.R. 1952 T.C. 435; *Krishnamurthi and Co. v. Sitaramayya*, A.I.R. 1958 Andhra 427; *Seetharamanjaneyulu v. Sobhanachalam & Co.*, A.I.R. 1958 Andhra 438; *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781; *Surajmal v. Doongarmal*, A.I.R. 1959 Raj. 27; *Mannalal v. Biharilal*, A.I.R. 1956 M.B. 38 (Indore); *Murlidhar Banwarilal v. Kishorelal Jagannath*, A.I.R. 1960 Raj. 296; *Motilal Partabchand v. Govindram Jeychand*, (1906) 30 Bom. 83; *Sassoon v. Tokersey*, (1904) 28 Bom. 616; *Mukundchand v. Sobhagmal*, A.I.R. 1925 Bom. 79; *Jivanchand v. Laxminarayan*, A.I.R. 1925 Bom. 511; *Eshoor Doss v. Venkatasubba*, (F.B.) (1895) 18 Mad. 306; *J. H. Tod v. Lakhmidas*, (1892) 16 Bom. 441; *Dayabhai Tribhovandas v. Lakhmichand Panachand*, (1885) 9 Bom. 358; *Kong Yee Lone & Co. v. Lowjee Nanjee*, (1902) 29 Cal. 461 P.C.; *Chhogmal v. Jainarayan*, (1915) 39 Bom. 1; *Ajudhia v. Lalman*, (1903) 25 All. 38; *Kanwar Bhan v. Ganpat Rai*, (1926) 7 Lah. 442; *Bhagwandas v. Burjorji*, (1917) 42 Bom. 373; *Kundan Lal v. Qadir Ahmad*, (1924) 78 I.C. 916; *Hurmukhrai v. Narotandas*, (1907) 9 Bom. L.R. 125; *Kesarichand v. Merwanjee*, (1899) 1 Bom. L.R. 263; *Meghji v. Jadhewji*, (1910) 12 Bom. L.R. 1072; *Mathuradas v. Narbadashankar*, (1909) 11 Bom. L.R. 997; *Narbadashankar v. Mathuradas*, (1910) 12 Bom. L.R. 1058; *Champsey v. Gill & Co.*, (1905) 7 Bom. L.R. 154, and, on appeal, 805.

3. *Alamai v. Positive Government Security Life Assurance Co. Ltd.*, (1899) 23 Bom. 191.

4. *Narayana v. Vellachami*, (F.B.) A.I.R. 1927 Mad. 583; *Shannuga v. Kumaraswami*, 48 Mad. 661; A.I.R. 1925 Mad. 870 affirmed.

not be wagering.¹ The mere existence of an element of chance does not necessarily render a transaction a wagering one.² To deal in differences only is one thing. It is quite another thing where both parties agree that under no circumstances should either of them require the other to give or take delivery. A person may be in a position to give or take delivery and yet may agree to settle the contracts by differences only.³ Two wrestlers agreed to play a wrestling match on condition that the party failing to appear on the day fixed was to forfeit Rs. 500 to the opposite party, and the winner was to receive Rs. 1,125 out of the gate money; on one wrestler failing to appear in the ring the other sued him for Rs. 500. The suit was maintainable; the agreement was not one of wagering.⁴

Construction of wagering contracts.—The question whether the transactions between the parties were wagering transactions, in other words, were bets, is one of fact. The essence of a bet is that both parties agree that they will pay and receive money respectively on the happening of an event in which they have no material interest. The transaction may be cloaked behind the forms of genuine commercial transactions: but to establish the bet it is necessary to prove that the documents are but a cloak and that neither party intended them to have any effective legal operativeness. Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value.⁵ Where the circumstances as to contracts for sale, purchase, and delivery of goods at a given time and place are such as to warrant the legal inference that the contracting parties never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, the contract is not a commercial transaction, but a wager on the rise or fall of the market.⁶ Some of such contracts may also be void under Section 23,⁷ *supra*.

In construing a contract with a view to finding out whether it is of a wagering character, the Court, in arriving at its conclusion, will not confine

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1. *Balvani Vishnu v. Mishrilal*, A.I.R. 1925 Bom. 115.
 2. *Venkataramana v. Sanjayayya* A.I.R. 1934 Mad. 136.
 3. *Chimanlal v. Nyamatrai*, A.I.R. 1938 Bom. 44; *Forget v. Ostigny*, [1895] A.C. 318: 72 L.T. 399; *Thacker v. Hardy*, (1878) 4 Q.B.D. 685 referred to.
 4. *Babasaheb v. Rajaram*, A.I.R. 1931 Bom. 264.
 5. *Ismail Lebbe v. Bartlett & Co.*, A.I.R. 1942 P.C. 19 (a case from Ceylon); *Thacker v. Hardy* (1879), 4 Q.B.D. 685: 48 L.J. Q.B. 289: 39 L.T. 595: 27 W.R. 158.
 6. *Kong Yee Loo & Co. v. Lowjee*, (1902) 29 Cal. 461 P.C.; *Lakshmi Narayana v. Nanjaiah*, A.I.R. 1965 Andhra 136.
 7. *Lakshmi Narayana v. Nanjaiah*, A.I.R. 1965 Andhra 136.

its attention to the mere words on which it is expressed, for very often a wagering contract is concealed under the guise of language which on its face constitutes a legally enforceable contract. The parties may try to camouflage their transaction by getting it up as a delivery transaction when in fact it is not their intention that it should be so. The Court will enquire as to whether it was ever within their contemplation that goods should be delivered. When their real intention was only to pay a difference on or after the due date, the transaction will be construed as a wagering one. A contract may thus nonetheless be a contract by way of gaming or wagering because it purports to give the buyer or seller an option of demanding delivery or acceptance, as the case may be, of the subject-matter of the contract. It is not sufficient that an intention to deal in differences existed on the part of one of the contracting parties only. In order to ascertain the real intention of the parties, the Court may well scan the surrounding circumstances of the case and can even go behind a written contract.¹ To be a wagering contract there must be a bargain for differences. Even if a party to a transaction had an option under the terms of the contract to demand delivery, the transaction may still be regarded a wagering contract and therefore void, if the bargain is only for the differences.² Such a bargain may appear on the face of the contract in which case no further evidence would be required to condemn the contract as a wagering one. Where the contract on the face of it appears to be a contract for the sale of goods for a price, extrinsic evidence may establish that there was a common intention to wager, that is, the intention of both the parties to the contract was that the title to the goods would not pass or, in other words, there is to be no delivery, but the intention was only to take only differences according to the rise and fall of the market on the date of delivery mentioned in the contract. If such an intention is established, the contract is a wagering one, and so void. If such an intention on the part of one of the contracting parties is established and it is further established that the other party though intending a trading transaction was aware of the other's

1. *Walyti Ram v. Bhagwan Dass*, A.I.R. 1960 Punj. 471; *Shanti Lal v. Madan Lal*, A.I.R. 1954 All. 789; *Murlidhar Bunwarilal v. Kishorelal Jagannath*, A.I.R. 1960 Raj. 296; *Bhagwandas v. Burjorji*, A.I.R. 1917 P.C. 101; *Ram Krishna Das v. Mutsaddilal*, A.I.R. 1942 All. 170; *Universal Stock Exchange Ltd. v. Strachan*, [1896] A.C. 166; 66 L.J. Q.B. 428; 74 L.T. 468; 44 W.R. 497; *In re Grieve*, [1899] 1 Q.B. 794; 68 L.J. Q.B. 509; 80 L.T. 438; 47 W.R. 441; 15 T.L.R. 251; *Sukdedoss Ramprasad v. Govindoss Chaturbhujadoss & Co.*, 51 Mad. 96; 55 I.A. 32; 107 I.C. 29; A.I.R. 1928 P.C. 30; *Harcharan Das v. Jai Jai Ram*, (1940) All. 136; 188 I.C. 29; 1940 A.L.J. 48; A.I.R. 1940 All. 182; *Ismail Lobbe v. Bartleet & Co.*, A.I.R. 1942 P.C. 19; *Mannalal v. Biharlal*, A.I.R. 1956 M.B. 38 (Indore); *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781; *Suganchand v. Fulchand*, A.I.R. 1957 M.P. 194; *Sukharam v. Baldeodas*, A.I.R. 1957 M.P. 138; *Buddulal v. Shrikishan Chandmal*, A.I.R. 1961 M.P. 57 (Indore); *Motilal Partabchand v. Govindram Jeychand*, (1906) 30 Bom. 83; *Doshi Talakshi v. Shah Ujamsi Velsi*, (1900) 24 Bom. 227; *Jessiram Juggemath v. Tulsidas Damodar*, (1913) 37 Bom. 264.

2. *Shewkissen v. Mangalchand*, A.I.R. 1941 Cal. 341; *Shanti Lal v. Madan Lal*, A.I.R. 1954 All. 789; *Ram Krishna Das v. Mutsaddilal*, A.I.R. 1942 All. 170.

intention, at the time of the formation of the questioned contract possibly it would be regarded as a wagering contract. But when it is found that all or substantial part of the goods were actually taken delivery of, such a forward contract must necessarily be taken to represent a genuine commercial transaction, as the fact of delivery destroys the inference of a common intention to wager.¹

Where there has been an unambiguous written contract, and the expressed terms themselves establish that the contract is a wagering one, parole evidence is not admissible to vary or contradict those terms.² A contract cannot be made a wager by matters subsequent.³

Illegality.—Though wager is void and unenforceable it is not forbidden by law. An agreement is therefore not unlawful though its object is to carry on wagering transactions.⁴ In case of wager, however, the party is not entitled to claim back the deposit.⁵ Particular transactions for the purchase and sale of goods comprised two classes of contracts—the one class suitable to traders, such as the defendants were, and all duly fulfilled by delivery and payment, and the other class extravagantly large and left without any attempt at fulfilment. The inference was that in the latter class the parties never intended completion, but that the contracts were for differences only; and where such differences formed the consideration for which a promissory note was given, the plaintiffs could not recover in a suit on the note.⁶ Wagering contracts not being illegal but being simply destitute of legal effect, if fraud is practised on plaintiff, the maxim *potior est conditio defendentis* will not apply.⁷ A suit by a party to a wagering contract lies to set aside an award made in pursuance of a submission contained in such a contract.⁸ The fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.⁹

Where a forward contract for the purchase and sale of goods was void on the ground of wagering, under Section 30 of the Indian Contract Act, a

1. *Showkissen v. Mangalchand*, A.I.R. 1941 Cal. 341; see *Vissanji Sons & Co. v. Shapurji Burjorji*, (1912) 36 Bom. 387 P.C.; *Bashi Ram v. Ram Sahai*, A.I.R. 1934 Lah. 85 (badni transaction).

2. *Juggernaut Sew Bux v. Ram Dayal*, (1883) 9 Cal. 791.

3. *Rangasa v. Hukumchand*, (1929) 120 I.C. 406.

4. *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781; *Mahadeodas v. Gherulal*, A.I.R. 1958 Cal. 703; *Shanti Lal v. Madan Lal*, A.I.R. 1954 All. 789; *Dayabhai Tribhovandas v. Lakhmichand Panachand*, (1885) 9 Bom. 358; *Eshoor Doss v. Venkatasubba*, (F.B.) (1895) 18 Mad. 306.

5. *Ram Gopal v. Gpvind Das*, A.I.R. 1944 All. 196; *Chhanga Mal v. Sheo Prasad*, (1920) 42 All. 449; *Dayabhai v. Lakhmichand*, (1885) 9 Bom. 358.

6. *Kong Yee Lone & Co. v. Lowjee Nanjee*, (1902) 29 Cal. 461 P.C.; *Trikam Damodhar v. Lala Amarchand*, (1871) 3 B.H.C. A.C. 171.

7. *Dayabhai Tribhovandas v. Lakhmichand Panachand*, (1885) 9 Bom. 358.

8. *Karunakumar v. Lankaran*, (1933) 60 Cal. 857.

9. *Beni Madho v. Kausal Kishor*, (1900) 22 All. 452; *Subbaraya v. Devandra*, (1884) 7 Mad. 301

subsequent cross-contract, as a result of which the differences payable under the original wagering contract were settled, was void under Section 1 of Bombay Act III of 1865.¹ But as to the general law on the subject see *Ratan Lal v. Firm Mangi Lal*, A. I. R. 1963 M. P. 323.

Burden of proof.—Ordinary presumption is in favour of the legality of a contract. The burden of proving that a particular contract was a wagering contract lies on the party which alleges the contract to have been a wagering one.² Where there is no evidence in the case that the parties did not intend to give or take delivery but during the vast number of transactions the parties have actually given delivery and taken delivery, if towards some part of the goods there was no delivery but an adjustment of claims that does not vitiate the transactions in the case as being by way of wager.³ The mere fact that, on settlement of some contracts, the differences were entered in the books does not establish that it was the intention of the parties not to call for or give delivery.⁴ A subsequent agreement to the effect that the buyer has no longer a right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering contract.⁵ In order to prove the original contract to be a wagering one the common intention of the parties from the inception must be proved to have been to take only the difference in prices on the happening of an event.⁶ Where the terms of the contract between the parties have not been proved, the mere fact that in the past delivery was never demanded or given is not a circumstance from which a necessary inference can be drawn that the contracts were entered into upon the terms that the performance should not be demanded but the differences only should become payable.⁷

Oral evidence is admissible to prove a contract to be a gaming transaction.⁸ The party challenging the validity of the impugned transaction must show that it was illegal in one way or the other.⁹

Collateral transactions.—Though a wagering contract is void, a con-

1. *Jivanchand v. Laxminarayan*, (1925) 49 Bom. 689.

2. *Kanwar Bhan v. Ganpat Rai*, (1926) 7 Lah. 442; *Sukharam v. Baldeodas*, A.I.R. 1957 M.P. 138; *Nand Kishore v. Lachi Narain*, A.I.R. 1954 Raj. 24 (Jaipur); *Surajmal v. Doongarmal*, A.I.R. 1959 Raj. 27; *Walyti Ram v. Bhagwan Dass*, A.I.R. 1960 Punj. 471; *Hagami Lal v. Bhuralal*, A.I.R. 1961 Raj. 52.

3. *Sitaram v. Chamanlal*, A.I.R. 1952 Hyderabad 95; *Bhagwandas v. Burjori*, 42 Bom. 373; A.I.R. 1917 P. C. 101; *Motilal v. Govindram*, 30 Bom. 83; 7 Bom. L.R. 385; *Mohamed Valli v. East Asiatic Co. Ltd.*, 14 Rang. 347; A.I.R. 1936 Rang. 319.

4. *Krishnamurthi and Co. v. Sitharamayya*, A.I.R. 1958 Andhra 427; *Shewkissen v. Mangalchand*, A.I.R. 1941 Cal. 341.

5. *Seetharamanjaneyulu v. Sobhanachalam & Co.*, A.I.R. Andhra 438.

6. *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781; *Surajmal v. Doongarmal*, A.I.R. 1959 Raj. 27.

7. *Walyti Ram v. Bhagwan Dass*, A.I.R. 1960 Punj. 471; *Sukharam v. Baldeodas*, A.I.R. 1957 M.P. 138.

8. *Anupchand Hemchand v. Champsi Ugershand*, (1888) 12 Bom. 585.

9. *Ouseph Paulo v. Catholic Union Bank, Ltd.*, A.I.R. 1965 S.C. 166.

ract collateral to such a contract is not necessarily unenforceable, and the fact that a person has constituted another person his agent to enter into a wagering contract in the name of the latter, but on behalf of the former, the principal, amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions.¹ Though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under Section 23. Partnership being an agreement, it is not unlawful though its object is to carry on wagering transactions.² Where the transactions are proved to be of a wagering character and special provisions like those contained in Sections 20 A and 30 B of the Mewar Contract Act, 1942, are in force, even contracts collateral to wagering transactions would become bad though otherwise they would not be so. In a case where the principal contracts have themselves not been established to be of a wagering nature, there can be no question of the collateral contracts whether of indemnity or otherwise being bad.³ A contract of employment as a broker for sale and purchase of securities is no doubt connected, and intimately, with sales and purchases of securities; but it is not itself a contract of sale or purchase. It is collateral to it, and does not become *ipso facto* void, even if the contract of purchase and sale with which it is connected is void.⁴ Section 6 of the Bombay Securities Contracts Control Act, 1925, expressly provides that no claim shall be maintained in a civil court for the recovery of any commission, brokerage, fee, or reward in respect of any contract for the purchase or sale of securities. The bar is thus to the broker claiming remuneration in any form for having brought about the contract. The contract of employment is however not itself declared void, and a claim for indemnity will not be within the prohibition.⁵ Where a broker acts on behalf of his customer and the customer gambles, the customer cannot, in the absence of a special law, set up a plea of gaming and wagering against the broker's claim.⁶

In some of the States, because of amendments to the Indian Contract Act, 1872, whether expressly or by implication, contracts collateral to or in respect of wagering transactions cannot be enforced. In such States the law puts a

1. *Bonkey Lal v. Bhagvath*, A.I.R. 1940 All. 95; *Shibho Mal v. Lachman Das*, (1901) 23 All. 165; 1901 A.W.N. 33; *Jagat Narain v. Sri Krishan Das*, (1911) 33 All. 219; 8 I.C. 783, 7 A.L.J. 1146; *Bisheshar Dayal v. Jwala Prasad*, 36 All. 426; 25 I.C. 415; 12 A.L.J. 817; A.I.R. 1914 All. 321; *Bhagwandas v. Burjorji*, 42 Bom. 373; 44 I.C. 284; 45 I.A. 29; A.I.R. 1917 P.C. 101; *Mahadeodas v. Gherulal*, A.I.R. 1958 Cal. 703, *Hira Lal v. Ram Bhai*, A.I.R. 1925 All. 102; *Shibho Mal v. Lachman Das*, (1901) 23 All. 165. See Cheshire and Fifoot, *Law of Contract*, 6th ed., 1964, pages 53-56 & 107. See also under S. 176, *post*.

2. *Gherulal v. Mahadeodas*, A.I.R. 1959 S.C. 781.

3. *Surajmal v. Doongarmal*, A.I.R. 1959 Raj. 27, *Sassoon v. Tokersey*, 28 Bom. 616, *Chimanlal v. Nyamatrai*, A.I.R. 1938 Bom. 44.

4. *Kishan Lal v. Bhanwar Lal*, A.I.R. 1954 S.C. 500, *Jugal Kishore Rameshwardas v. Goolbai Hormusji*, A.I.R. 1955 S.C. 812.

5. *Jugal Kishore Rameshwardas v. Goolbai Hormusji*, A.I.R. 1955 S.C. 812.

6. *Galdas v. Manicklal*, A.I.R. 1941 Cal. 125; *Thacker v. Hardy* (1879), 4 Q.B.D. 683; 48 L.J.Q.B. 289; 39 L.T. 595; 27 W.R. 158.

contract collateral to an agreement by way of wager on the same footing as the agreement itself. But in order to bring the case within the meaning of the amending Sections (Sections 30 A and 30 B of the Indore Contract Act, for example,) the transactions in respect of which the brokerage, commission, or losses are claimed must amount to wagering agreements.¹

There are also some judicial decisions holding contracts collateral to wagering contracts as unenforceable.²

Agent and principal in wagering contracts.—Commonly and logically, the plea of wagering depends on the common intention of the parties to the contract and the plea cannot arise between a party and his agent. The agent merely puts through the contract between the principal and a third party, and therefore to establish the plea of wagering it must be proved that as between the principal and the third party there was common intention to wager. The contract of the agent is only to carry out the order of the principal and to get his remuneration.³ A broker is an agent.⁴ A contract of employment as a broker is a contract of agency.⁵ The fact that the principal was a speculator, who never intended to give delivery, and even that the agent did not expect him to deliver, would not convert a contract, otherwise innocent, into a wager.⁶ Thus, generally speaking, and *in the absence of special law*, the position as respects suits brought by an agent or a broker to recover his brokerage or commission in respect of transactions entered into by him in his capacity as a broker or a commission agent is that such suits can be successfully maintained, even though contracts in respect of which such claims are claimed are contracts by way of wager on the principle that agreements collateral to wagering agreements do not fall within the mischief of Section 30 and can be enforced in a court of law, unless it is established that the contracts which the commission agent or the broker entered into with third parties on behalf of his constituent are wagering contracts as between the agent or broker and those third parties.⁷ Where wagering contracts are entered into by a person not directly with another but through his agency, the agent will be entitled to recover the losses on contracts, provided he proves that either he paid those losses to the persons with whom those contracts were entered into or to their assignees he incurred a pecuniary liability to make good those losses and that liability is still enforce-

1. *Mannalal v. Bihari Lal*, A.I.R. 1956 M.B. 38 (Indore).

2. *Rajaram v. Shah Kapoor Firm*, A.I.R. 1964 Andhra 537; see also the cases referred to.

3. *Ram Deo v. Seth Kaku*, (F.B.) A.I.R. 1950 E.P. 92, *Muthuswami v. Veeraswami*, A.I.R. 1936 Mad. 486; *Kshitesendra v. Madaneshwar*, (1936) 63 Cal 1234, *Hardeo Das v. Ram Prasad*, (1927) 49 All. 438; *Ram Prasad v. Ramji Lal*, (1928) 50 All. 115.

4. *Goulds v. Manshlal*, A.I.R. 1941 Cal. 125.

5. *Jugal Kishore Rameshwardas v. Goolbat Hormusji*, A.I.R. 1955 S.C. 812.

6. *Bhagwandas v. Burjorji*, A.I.R. 1917 P.C. 101; *Muthuswami v. Veeraswami*, A.I.R. 1936 Mad. 486.

7. *Surajmal v. Deongarmal*, A.I.R. 1959 Raj. 27; *Karunakumar v. Lankaran*, (1933) 60 Cal. 856; *Daya Ram v. Murli Dhar*, (1927) 49 All. 926; *Jagat Narain v. Sri Kishan*, (1911) 33 All. 219.

able against him.¹ Where the plaintiff sued the defendant for re-imbursment of loss incurred by him on behalf of the defendant as the latter's agent in the forward contract business, there was no legal bar to the entertainment of such a claim on the ground that the transaction has been in the nature of a wagering contract, the claim not being one for enforcement of any claim under such a contract.² The position of a *pucca arhatia* or a *del credere* agent is the same as that of a principal.³ Both the *pakka adatia* and the constituent are principals with reference to the contract irrespective of the fact whether the former has entered into other contracts with third persons to cover any contract or not. As between the constituent and the *pakka adatia* their contract is complete.⁴ Two persons cannot be principals in a contract without privity being established between them.⁵ Under a *nazrana* contract an agent can recover monies paid out by him on behalf of his principal even in wagering contracts.⁶

An agent who has received money to the use of his principal on an illegal contract between him as such agent and a third party cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received.⁷ An auctioneer is a stakeholder, and is bound to refund money had and received. See *Nannho Bibi v. Ram Swarup*, A.I.R. 1965 All. 533.

Speculation.—Mere speculation where it does not amount to wager is not, apart from special legislation, illegal. To hold it illegal on the ground that it is opposed to public policy would be to extend public policy far beyond what has been established and the Courts should refuse to do so.⁸ Speculation does not necessarily involve a contract of wager. To constitute a contract of wager a common intention of wager is essential.⁹ There must be proof that the contract was entered into upon the terms that performance of the contract should not be demanded but the difference only should become payable. Even if one party to the contract was a speculator who never intended to give delivery and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that

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3. *Sagarmal Har Saran v. Bishambhar*, A.I.R. 1947 All. 14.

4. *Dhruv Chhotatal v. Gulabray Pragji*, A.I.R. 1954 Sau. 99; *Bhagwandas v. Kanji*, (1906) 30 Bom. 205; 7 Bom. L.R. 611; *Manilal v. Radhakisson*, (1921) 45 Bom. 386.

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6. *Pirithi Singh v. Matu Ram*, (1932) 13 Lah. 766; *Behari Lal v. Parbhu Lal*, 79 P.R. (F.B.) 1908; *Arjan Das v. Walaiti Ram*, A.I.R. 1928 Lah. 420.

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the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager, nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims vitiate the transaction.¹

Speculation is different from wager and there is no law against speculation as there is against gambling or wagering.² Every forward contract is to some extent speculative but merely on that account it is not necessarily a gambling one. The mere fact that a contract is highly speculative is of itself insufficient to render the said contract void as a wagering contract.³ Contracts are not wagering contracts unless it be the intention of both the contracting parties, at the time of entering into the contracts, under no circumstances to call or give delivery to each other. Merely showing a contract to be highly speculative is insufficient to render it void as a wagering contract.⁴ Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.⁵ The mere fact that contracts are highly speculative is insufficient in itself to render them void as wagering contracts; to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable.⁶ A speculative transaction between *pakka adatia* in Bombay and his upcountry constituent is not necessarily wagering.⁷

Pakki adat transactions.—*Pakki adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.⁸ Even these contracts like any other contracts may however be shown to be wagering ones.⁹ Where a contract between a *pakku arhtiya* and his constituent provides that there should be no delivery but that only differences should be paid by one party to the other and that the constituent would have no right to enquire from the *pakka arhtiya* as to whom he had to pay any losses in respect of the transaction in question, the contract is a wagering contract and cannot be enforced.¹⁰ The mere use of the expression

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7. *Deushi v. Bhikamchand*, A.I.R. 1927 Bom. 125.

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10. *Harcharan v. Jai Jai Ram*, A.I.R. 1940 All. 182; *Ramdin v. Mansa Ram*, 51 All. 1027;

pakka adatia by the plaintiffs to characterise the defendants is not enough to infer that the defendants had entered into the transactions in question as principals and not as agents of the plaintiffs and to attract the incidents of *pakka adat* business so as to found a plea of wager between the plaintiffs and the defendants.¹ As to *arhtiyas* as agents see vol. 2, Section 181.

As to proper issues in a suit by a *pakka adatia* see *Mani Lal v. Radhakisson*, (1921) 45 Bom. 386.

One *A* entered into certain wagering contracts with *B*, a *pukka arhatia*, who was to buy and sell grain on *A*'s account, the delivery of the grain not being contemplated. *A* from time to time deposited some money with *B* as *sai* or cover or margin. The transactions, however, resulted in a loss and *B* filed a suit for recovery of the loss. The transaction being a wagering one, and therefore illegal, *B* was not entitled to get a decree and his suit failed. Subsequently *A* filed a suit for the recovery of the money deposited by him. The contract being a wagering one was void *ab initio* and was governed by Section 30 of the Contract Act. *A* was not entitled to recover the cover money deposited by him with *B*. Section 65 could not help *A*, as it refers to an agreement which is discovered to be void or which becomes void.² A *pakka adatia* in Bombay is entitled to call for margin, though onus is on him to prove justifying circumstances.³

Kacha adatia.—The position of a *kachcha arhtiya* is that he acts as an agent with personal liability on himself, so far as the third party is concerned. His remuneration consists solely of commission and he is in no way interested in the profit or loss made by his constituents on the contracts entered into by him on his constituents' behalf. The position of a *pakka arhtiya* is different. Where there is a contract between a *pakka arhtiya* and a constituent, the *pakka arhtiya* is himself responsible to his constituent. The fact that he did or did not enter into a contract with a third party in pursuance of the order of his constituent makes no difference. For all practical purposes the *pakka arhtiya* himself and his constituent act as principal parties. In case of a *kachcha arhtiya* if he does not enter into a contract with a third party in pursuance of the instructions given by his constituent, then the order by the client remains an unexecuted order. But a contract between a *kachcha adatia* on one side and his constituent on the other is a contract between them as principals and the *pakka arhtiya* does not act, in such cases, as an agent of his constituent.⁴

A.I.R. 1929 All. 890; 122 I.C. 881; 1929 A.L.J. 1140; *Devshi v. Bhikamchand*, A.I.R. 1927 Bom. 125.

1. *Murlidhar Banwarilal v. Kishorelal Jagannath*, A.I.R. 1960 Raj. 296.

2. *Sagarmal Har Saran v. Bishambar*, A.I.R. 1947 All. 14. *New Marine Coal Co. v. Union of India*, A.I.R. 1964 S.C. 152.

3. *Devshi v. Bhikamchand*, A.I.R. 1927 Bom. 125.

4. *Harcharan v. Jai Jai Ram*, A.I.R. 1940 All. 182; *Fakir Chand v. Doolub Chaud*, 7 Bom. L.R. 213; *Harnarayan v. Radhakisan*, 75 I.C. 906; A.I.R. 1923 Nag. 324; *Chhogmal v. Jainarayan*, 20 I.C. 882; 15 Bom. L.R. 750; *Moti Chand v. Keshav Appaji*, A.I.R. 1920 Bom. 88; 57 I.C. 129; 22 Bom. L.R. 406.

A *kachcha adatia* in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay, both the *kachcha adatia* and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the *kachcha adatia* transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The *adatia* enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed.¹ A contract of *cutchha adatia* agency is not a wagering contract.

The respondent acting as *katcha adatia* for the appellant made forward contracts on his behalf for the purchase and sale of cotton, and had dealings on his behalf in options on cotton, known as *teji mandi* transaction. The contracts of purchase and sale and the *teji mandi* transactions, entered into by the respondent with the third parties, were genuine and not wagering contracts, but there was an understanding between the appellant and the respondent that the former should not be called upon either to take or to give delivery. It was held that the dealings between the appellant and the respondent were not void as wagering contracts, and that the respondent was entitled to be indemnified by the appellant against losses for which he became liable to the third parties. The understanding abovementioned meant only that the respondent would, by covering contracts or otherwise, provide for or take the goods, or pay the differences on the appellant's behalf.²

Forward contracts.—A forward contract is an executory contract consisting of two reciprocal promises between the two parties, namely, the buyer and the seller. It is an agreement to sell or buy by one person to another to be performed on a subsequent date as fixed by the parties. Delivery and payment are concurrent conditions.³ Forward contracts for the purchase and sale of goods are recognized forms of commercial transactions. They may be perfectly legitimate and genuine trade transactions though of a speculative character.⁴ A forward contract becomes an illegal wagering contract when the parties by common consent agree to speculate only in differences according to the rise and fall in the prices in the market and the delivery of the goods is not in the contemplation of either and the transaction is merely a bet on prices and a gamble in differences. Every forward contract is to some extent speculative but merely on that account it is not necessarily a gambling one.⁵ The words 'forward contract' as defined in

1. *Mukundchand v. Sobhagmal*, A.I.R. 1925 Bom. 79.

2. *Sobhagmal Gianmal v. Mukundchand*, (1927) 51 Bom, 1 P.C.: A.I.R. 1926 P.C. 119; *Manilal Dharamsi v. Allibhai Chagla*, (1922) 47 Bom. 263.

3. *Daya & Co. v. Ramakrishna Rice & Oil Mills*, A.I.R. 1956 Mad. 110.

4. *Shewkissen v. Mangalchand*, A.I.R. 1941 Cal. 341.

5. *Mannalal v. Biharilal*, A.I.R. 1956 M.B. 38 (Indore).

the Punjab Forward Contracts Tax Act, 1951, did not set out all the elements which are necessary to render a contract a wagering contract and so the said legislation to tax forward contracts as defined did not come within Entry 62 of List II—State List—in the Seventh Schedule to the Constitution, and was beyond the legislative competence of the State Legislature.¹

The Forward Contracts (Regulation) Act, 1952.—This Act provides for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. See Sections 14-19, *ibid*.

The Securities Contracts (Regulation) Act, 1956.—This Act prevents undesirable transactions in securities by regulating the business of dealing therein, by prohibiting options and by providing for certain other matters connected therewith. For the purpose of the Securities Contracts (Regulation) Act, 1956, 'Securities' include (i) shares, scrips, stocks, bonds, debentures, debenture stock, or other marketable securities of a like nature in or of any incorporated company or other body corporate; (ii) Government securities; and (iii) rights or interests in securities. See Sections 13-20, *ibid*.

Other transactions.—The *nazarana* or *gali* transactions are by themselves not necessarily wagering transactions. They are similar to the *teji mandi* contracts carried on in the Bombay market. Whether a particular transaction is a wagering contract is to be determined in the light of the evidence which is produced by the parties.² The party who pleads that a particular transaction was wagering in its nature has to prove the fact.³ The transactions of the nature where parties speculate on the varying rate of the goods are not *satta* and do not come within the purview of Section 30 of the Contract Act or Section 31 of the Hyderabad Contract Act, to be declared void.⁴ *Pakka pathi* contracts are not wagering.⁵ *Satta* transactions are wagering.⁶

There is no presumption as regards *teji mandi* transactions that they are wagering transactions.⁷ As to the nature of *teji mandi* contracts see *Baldeosahai v. Radhakishan*, A. I. R. 1939 Bom. 225.⁸ *Teji mandi* transactions are not necessarily wagering transactions.⁹ The view that *teji mandi* transactions are regarded as wagering transactions and the onus of proving that

1. *Bullion and Grain Exchange Ltd. v. State of Punjab*, A.I.R. 1961 S.C. 268.

2. *Sukharam v. Baldeodas*, A. I. R. 1957 M. P. 138; *Pirithi Singh v. Matu Ram*, A. I. R. 1932 Lah. 356.

3. *Suganchand v. Fulchand*, A. I. R. 1957 M. P. 194.

4. *Ram Avatar v. Ramjwan*, A. I. R. 1956 Hyderabad 131; *Sitaram v. Chamanlal*, A. I. R. 1952 Hyderabad 95.

5. *Sukdevdoss v. Govindoss*, A. I. R. 1928 P. C. 30; *Sukdevdoss v. Govindoss*, 51 Mad. 96.

6. *Chhanga Mal v. Sheo Prasad*, (1920) 42 All. 449.

7. *Sobhagmal v. Mukundchand*, A. I. R. 1926 P. C. 119; *Mukundchand v. Sobhagmal*, A.I.R. 1925 Bom. 79; *Manilal Dharamsi v. Allibhai Chagla*, 47 Bom. 263; A. I. R. 1922 Bom. 408; 24 Bom. L. R. 812.

8. See also *Pirithi Singh v. Matu Ram*, (1932) 13 Lah. 766; *Manilal Dharamsi v. Allibhai Chagla*, (1923) 47 Bom. 263, 265.

9. *Narandas v. Ghanshyamdas*, A. I. R. 1933 Bom. 348.

they are not such would lie heavily on the party so alleging is not tenable.¹ *Teji mandi* contracts cannot be held to be wagers on account of their apparent nature and characteristics alone without proof of the fact that the common intention of the contracting parties at the time of the contracts was to deal only in differences and in no circumstances to call for or give delivery.²

Prizes for horse-racing.—Section 30 of the Indian Contract Act though prohibiting agreements by way of wager does not render void any agreement for any plate, prize of the value of five hundred rupees or upwards or for a sum of money of the amount of five hundred rupees or upwards to be awarded to the winner or winners of any horse-race. A subscription or contribution made or an agreement to subscribe or contribute entered into for or towards such plate, prize, or sum of money is not unlawful. Thus both the consideration of subscription or contribution and the contract for any plate, prize, or sum of money of the value of Rs. 500 or upwards have been saved from being void on account of a wager being involved.

Section 294-A of the Indian Penal Code.—Though certain prizes for horse-racing have been excepted from the general provision of the law declaring agreement by way of wager as void, the exception in favour of horse-racing does not protect any transaction connected with horse-racing to which the provisions of Section 294-A of the Indian Penal Code, 1860, apply.

Lotteries.—Section 294-A of the Indian Penal Code lays down: "Whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorised by the State Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery shall be punished with fine which may extend to one thousand rupees."

The Prize Competitions Act, 1955, in defining the word prize competition has in view only such competitions as are of a gambling nature.³ Betting and gambling are not trade, business, commerce, or intercourse for the purposes of the Constitution. A prize competition that does not to a substantial degree depend upon the exercise of skill for its solution is one of a gambling nature. The element of chance is essential to make a prize competition a gambling transaction.⁴ The Bombay Lotteries and Prize Competitions Control and Tax Act of 1948 as amended by the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act of 1952 is a

1. *Jessiram Juggonath v. Tulsidas Damodar*, (1913) 37 Bom. 264.

2. *Manilal Dharamsi v. Allibhai Chagla*, (1923) 47 Bom. 263.

3. *Chamarbaugwalla v. Union of India*, [1957] S. C. R. 930 : A.I.R. 1957 S.C. 628.

4. *State of Bombay v. Chamarbaugwalla*, [1957] S. C. R. 874 : A.I.R. 1957 S.C. 699.

legislation with respect to betting and gambling falling under Entry 34 of List II of the Seventh Schedule to the Constitution and is within the competence of the State Legislature.¹

As to Prize Competitions Act, 1955, see under Section 23, *ante*.

Lottery is a game of chance; a distribution of prizes by lot or chance.² A scheme containing no element of skill is a lottery.³ In *Taylor v. Smetten*, 11 Q.B.D. 207, it was held that selling packets of good tea at prices worth the money, but in each packet of which (as publicly and truly stated) was a coupon entitling the purchaser to receive the prize (whatever it might turn out to be) mentioned on such coupon, was a lottery within the English Gaming Act, 1802 (42 Geo. 3, c. 119); so, of a missing-word competition (where any one of several words would fill the blank but the winning word was selected by chance) was such a lottery;⁴ so, of a weather-forecast competition;⁵ so, of a gratuitous distribution of medals, each medal bearing a number, some medals having a prize number entitling the holder of a medal on which it appears to a prize.⁶ A crossword competition in a Sunday newspaper was held to be a lottery within the English Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58).⁷ Where distribution of prize money in a competition depended as to 64 per cent on the skill of the competitor and 31 per cent on chance, the competition was a lottery within the English Betting and Lotteries Act, 1934.⁸

Issuing coupons in connection with a sporting newspaper and offering prizes for naming winners of races on such coupons was not a lottery within the English Gaming Act, 1802, or the English Lotteries Act, 1823 (4 Geo. 4, c. 60). Nor was it inviting a "bet or wager" within the English Betting Act, 1874 (37 & 38 Vict., c. 15);⁹ so, of a prize for predicting the number of births and deaths during a stated period in a stated locality;¹⁰ so, of a company formed for making advances to its members, the members to receive advances to be selected by lot.¹¹

As to what constituted 'keeping' within the English Gaming Act, 1802, (42 Geo. 3, c. 119) see *Martin v. Benjamin*, [1907] 1 K.B. 64. A body corpo-

1. *State of Bombay v. Chamarbaugwala*, [1957] S. C. R. 874; A.I.R. 1957 S.C. 699.

2. *Taylor v. Smetten* (1883), 11 Q.B.D. 207, Wharton: *Law Lexicon*, 14th edn. 1953, 613; Stroud: *Judicial Dictionary*, 3rd edn., 1952, vol. 2. 1691-92, *Kamakshi Achari v. Apparu Pillai*, (1863) 1 M.H.C. 448.

3. *Barker v. Numby*, [1939] 1 All E.R. 611.

4. *Barclay v. Pearson*, [1893] 2 Ch. 154.

5. *R. v. Pearson*, 37 S.J. 749.

6. *Wills v. Young*, [1907] 1 K.B. 448.

7. *Coles v. Odham's Press, Ltd.*, [1936] 1 K.B. 416, *contra*, *Witty v. World Service, Ltd.*, [1936] Ch. 303.

8. *Boucher v. Rowsell*, [1947] 1 All E.R. 870; *Moors v. Elphick*, [1945] 2 All E.R. 155.

9. *Caminada v. Hulton*, 60 L.J.M.C. 116; *Stoddart v. Sagar*, [1895] 2 Q.B. 474; *R. v. Stoddart*, 83 L.T. 538.

10. *Hall v. Cox*, [1899] 1 Q.B. 198.

11. *Wallingford v. Mutual Society*, 5 App. Cas. 685; *Sinclair v. Provident Association*, 31 Sc. L.R. 501

rate could not be convicted as rogues and vagabonds.¹ A physical lot is not essential to a lottery.² The mere existence of an element of chance does not necessarily make a transaction a lottery.³ A *chit fund* transaction may not necessarily be a lottery.⁴ Where the case is not one where a few out of a number of subscribers obtain prizes by lot but by the arrangement all get a return of the amount of their contribution it is not a lottery.⁵ A *chit fund* with arrangement for payment of prize every month by casting lot was held illegal as a lottery.⁶ As to *chit funds*, see below.

Where a transaction was one by way of wager and therefore void under a Central or State legislation, the previous sanction of the Government of India obtained for the undertaking of the War Loan Lottery, under which the said transaction took place, could not remedy the unenforceability thereof in civil law. No injunction could be granted in support of the said void transaction.⁷

The English law of wagering contracts.⁸—Under the English law, all contracts or agreements, whether by parole or in writing, by way of gaming or wagering are null and void. The stake cannot therefore be recovered by action. If again any stake has been already handed over, it cannot be recovered back.⁹ Even where a fresh agreement has been made subsequently to the original wagering contract binding the losing party or anybody in his behalf to pay an amount in consideration of the lost bet, it will not be treated as a distinct and binding contract. In other words, even a fresh contract whether between the same parties or between one of the parties and a third person who intervened only to help the party losing the bet will be considered void, if in the opinion of the Court the fresh contract shows that the consideration for its basis was in substance nothing but an equivalent of the bet lost.¹⁰

‘Wager’ is a contract by *A*, to pay money to *B*, on the happening of a given

1. *Hawke v. Hulton*, [1909] 2 K.B. 93.

2. *Barclay v. Pearson*, [1893] 2 Ch. 154.

3. *Venkataramana v. Sanyasappa*, A.I.R. 1934 Mad. 136.

4. *Narayana v. Vellachami*, (F.B.) A.I.R. 1927 Mad. 583; *Shanmuga v. Kumaraswami*, 48 Mad. 661; A.I.R. 1925 Mad. 870.

5. *Narayana v. Vellachami*, (F.B.) (1927) 50 Mad. 698; 103 I.C. 318; A.I.R. 1927 Mad. 583; *Venkataramana v. Setti Sanyasappa*, 66 M.L.J. 76; 149 I.C. 489; A.I.R. 1934 Mad. 136.

6. *Nagappa v. Arunachalam*, A.I.R. 1925 Mad. 281.

7. *Sir Dorabji Jamsetji Tata v. Edward F. Lance*, (1918) 42 Bom. 676.

8. For Gaming and Wagering in England see 18 Halsbury's Laws, (3rd edn.), pages 167—248.

9. *Bridger v. Savage* (1885), 15 Q.B.D. 363, 367; *Alberg v. Chandler* (1948), 64 T.L.R. 394; *Hill v. Hill (William) (Park Lane) Ltd.*, [1949] A.C. 530, 552; [1949] 2 All E.R. 452, 454.

10. *Hill v. Hill (William) (Park Lane) Ltd.*, [1949] A.C. 530; [1949] 2 All E.R. 452; *Coral v. Kleyman*, [1951] 1 All E.R. 518; *R. v. Weisz*, [1951] 2 K.B. 611; [1951] 2 All E.R. 408.

event, in consideration of *B*, paying money to him on the event not happening. At common law, in England, a wager was a legal contract, which the Courts were bound to enforce, so long as it was not against morality, decency, or sound policy. But by the English Gaming Act, 1845, Section 18 :—

“All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void ; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made : Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.”

Under the English Gaming Act, 1892, any promise to pay any person any sum paid by him in respect of any contract made void by the Act of 1845, or any commission in respect of any such contract is itself made void. The effect of the Gaming Act, 1893, is that money paid by *A*. for *B*. at the request of *B*. in discharge of bets lost by *B*. to other persons cannot be recovered by *A*. from *B*. The consideration for a cheque given, or in repayment of a loan made for wagering is bad, even though the cheque was drawn in a country where wagering is legal ; but money lent for such a purpose can be recovered.¹ There may, however, be a new consideration, e. g., an agreement to hold the cheque back and not present it for a certain time ; such new consideration will support an action. The deposit given to a stakeholder on a wagering contract may be recovered if not, or before it has been, paid over.

In England where a stake has been deposited with the stakeholder by a party, the former is regarded in law as the agent of the latter. Thus the stakeholder can be the agent of the wagering parties in respect of the respective stakes as deposited by them individually. As an agent, the stakeholder is required in law to return the respective stakes if it is so demanded by the depositors. When however the stake has been handed to the winner in view of the previous authority by the depositor, the depositor is helpless. But prior to the handing over, the depositor can ask for its return to him even where the bet has been lost and the result made known.² Though the stakeholder or any other person is regarded in given circumstances or acts in the eye of the law as the agent of a person who is a party to a wagering contract, he is not entitled under the English Gaming Act, 1892, to the usual indemnity of an agent for the obligations he has incurred,

1. *Saxby v. Fulton*, [1909] 2 K.B. 208, but see *Carlton Hall Club v. Lawrence*, [1929] 2 K.B. 153 ; Wharton : *Law Lexicon*, 14th edn. 1953, 1051.

2. *Varney v. Hickman* (1847), 5 C.B. 271 ; *Hampden v. Walsh* (1876), 1 Q.B.D. 189 ; *Diggie v. Higgs* (1877), 2 Ex. D. 422 ; *O' Sullivan v. Thomas*, [1895] 1 Q.B. 698.

whether pecuniary or otherwise, on behalf of his principal where the said obligations arose under or in respect of a wagering contract. According to Section 1 of the English Gaming Act, 1892, any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the English Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract, or of any services in relation thereto, or in connexion therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money. Thus money paid by a lender to the borrower or, at his instance, to the winner of the game or wager or to somebody on behalf of the winner is not recoverable where there has been a definite agreement, express or implied, that the money is to be used for gaming or for paying lost bet.¹ When, however, a loan has been made to a borrower and he as a borrower has been left at liberty to apply the money as he wishes, it is not invalidated by the Gaming Act, 1892, even though it is contemplated by both parties that he will probably pay betting debts with it. In cases where the loan is hampered by a stipulation that the money is to be used for payment of a betting debt, then no matter whether the stipulation is express or implied or to be inferred from the circumstances, the loan is a payment in respect of the betting debt and is hit by the English Gaming Act, 1892.²

The agent of a party to a wagering contract in the given circumstances has been deprived of the remedies ordinarily available to an agent.³ The agent cannot similarly be sued for damages for breach of the contract of agency even where he has failed or refused to execute the instructions of his principal in respect of any wagering contract.⁴ The principal can however recover the money received by the agent from the party which has lost the bet. Where the agent agreed to receive money for the use of the principal he is bound to hand it to the latter. A wagering contract is only a void transaction and not an immoral or illegal one, and as such, the agent is not permitted to gainsay his having received it for the use of his principal.⁵

A party to a wagering contract cannot sue upon a security given in respect of such contract irrespective of the fact whether it was given for a void consideration or for an illegal one. Only a holder in due course, that is, a bona

1. *Hill v. Fox* (1859), 4 H. & N. 359; *Tatan v. Reeve*, [1893] 1 Q.B. 44; *Carney v. Plimmer*, [1897] 1 Q.B. 634; *Saffery v. Mayer*, [1901] 1 K.B. 11; *Woolf v. Freeman*, [1937] 1 All E.R. 178; *MacDonald v. Green*, [1951] 1 K.B. 594; [1950] 2 All E.R. 1240.

2. *MacDonald v. Green*, [1951] 1 K.B. 594, 605; [1950] 2 All E.R. 1240, 1244; *Re O'Shea*, *Ex parte Lancaster*, [1911] 2 K.B. 981.

3. *Law v. Dearnley*, [1950] 1 K.B. 400; [1950] 1 All E.R. 124.

4. *Cohen v. Kittel* (1889), 22 Q.B.D. 680.

5. *Griffith v. Young* (1810), 12 East. 513, 514; *Bridger v. Savage* (1885), 15 Q.B.D. 363; *Moore v. Peachey* (1891), 7 T.L.R. 748; *Potter v. Codrington* (1892), 9 T.L.R. 54; *Grimard v. Wiltshire* (1894), 10 T.L.R. 505; *De Mattos v. Benjamin* (1894), 63 L.J. (Q.B.) 248; *Cheshire & Co. v. Vaughan Bros. & Co.*, [1920], 3 K.B. 240, 255.

fide holder for value, can sue upon such security.¹

In England, certain games have been made illegal by statute² and some by common law. There, money lent for playing at or betting on, a game whether legal or illegal is not recoverable at common law.³ Where the loan has been incurred for gaming outside England, it can be recovered in England only when the said loan could be recovered in that foreign country.⁴ Wager is an instance of a thing which is null and void in the sense of being irrecoverable without being illegal in the sense of being punishable or forbidden.

There cannot be more than two parties, or groups of parties, to a wagering contract. The essence of a wagering contract is that either party stands to win or lose upon the determination of the event in question.⁵ A new agreement to pay what is in effect the amount of a lost bet is not actionable whether it is made for fresh consideration or not.⁶ A negotiable instrument is normally presumed to have been given for consideration. If it is given in respect of any wager other than on a game this presumption holds good, and it is for the party sued on it to prove the contrary. But if given in respect of a wager on a game, it is deemed to have been given for an illegal consideration, and the party suing on it must prove that subsequently to the illegality value has been given in good faith.⁷ Money lent to a borrower which will enable him to pay bets that he has already lost is recoverable provided that there is no obligation imposed upon him, expressly or inferentially, to employ the money in the payment of the bets.⁸

The meaning of gaming as defined in the Betting and Gaming Act, 1960, for the purposes of that Act was narrower than the meaning that the word had at common law. In *Director of Public Prosecutions v. Regional Pool Promotions, Ltd.*, [1964] 1 All E.R. 65 Q.B.D., the members of the club did nothing, they neither exercised skill nor made a choice, and accordingly there was no playing of a game and no gaming within Section 28 of the said Act, with consequence that the activities were not excepted from being unlawful lotteries. As to lawful and unlawful gaming club, see *Director of Public Prosecutions v. Essoldo Circuit (Controls), Ltd.*, [1965] 3 All E.R. 421. The Betting and Lotteries Act, 1934, and the Betting and Gaming Act, 1960, with minor exceptions, have been repealed and replaced by the Betting, Gaming and Lotteries Act, 1963, which came into force on March 28, 1963.

1. *Hay v. Ayling* (1851), 16 Q.B. 423; *Fitch v. Jones* (1855), 5 E. & B. 238; *Lilley v. Rankin* (1886), 56 L.J. Q.B. 248; *Woolf v. Hamilton*, [1898] 2 Q.B. 337.

2. Section 18 of the English Gaming Act, 1845.

3. *M'Kinnell v. Robinson* (1838), 3 M. & W. 434; *Applegarth v. Colley* (1842), 10 M. & W. 723, 732; *Carlton Hall Club v. Laurence*, [1929] 2 K.B. 153.

4. *Quarrier v. Colston* (1842), 1 Ph. 147; *Saxby v. Fulton*, [1909] 2 K.B. 208.

5. *Ellsmere (Earl) v. Wallace*, [1929] 2 Ch. 1.

6. *Hill v. William Hill (Park Lane), Ltd.*, [1949] A.C. 530.

7. *Fitch v. Jones* (1855), 5 E. & B. 238 (English Gaming Act, (1835)).

8. *MacDonald v. Green*, [1951] 1 K.B. 594; see *Cheshire and Fifoot: Cases on the Law of Contract*, 3rd. edn., 1959, 200-220.

Action does not lie on a promise rendered null and void by the Gaming Act, 1845, read with the Gaming Act, 1892.¹ Loans made knowingly for lawful gaming in England are recoverable by action.²

The Betting, Gaming and Lotteries Act, 1963 (1963, c. 2).—This Act consolidates provisions of those enactments relating to betting, gaming and lotteries as are mentioned in its Schedule 8. The Lotteries and Gaming Act, 1962, has been repealed wholly. The Betting and Gaming Act, 1960, has also been repealed, excepting its few Sections. By its Section 41, subject to the provisions of the Betting, Gaming and Lotteries Act, 1963, all lotteries are unlawful in England. The Act however does not apply to Northern Ireland. Section 41 of the Act of 1963 replaces Section 21 of the Betting and Lotteries Act, 1934. Section 56 of the Act of 1963 also amends Section 11 of the Gaming Act, 1845.

Assurance and insurance.—The word “assurance” is sometimes used in the sense of a deed or securing of a title. “An assurance is something which operates as a transfer of property.”³ In the old English statutes against usury, for example, “assurance”, in the phrase “all bonds, contracts, and assurances” for payment of money lent upon usury,⁴ meant an assurance of land, “as is the proper signification of it”. “Assurance” also means insurance. “Assured” means insured. An “assurance company” is an insurance company.⁵ “Assurance” is a term used exclusively in respect of a risk on the life of a human being.⁶ “Assured” means a person assured and indemnified against certain events. “Assurer” is an insurer against certain perils and dangers; an indemnifier.⁸ ‘Assure’ is used interchangeably with ‘insure’ in insurance law. For the purpose of legislative drafting however ‘assured’ may be kept, in certain cases, distinct from ‘insured’. Thus, where a wife insures her husband’s life for her own benefit and he has no interest in the policy, she is the ‘assured’, and he the ‘insured’.

Insurance is a contract between an insurer and an assured whereby the insurer undertakes to provide against a risk apprehended by the assured.⁹ Insurance is distinguished from a gaming or wagering contract in that the risk of loss to be covered in an insurance is not created by the contract itself. The English Marine Insurance Act, 1906, renders even the expectation of an

1. *C.H.T., Ltd. v. Ward*, [1963] 3 All E.R. 226 Q.B.D.

2. *C.H.T., Ltd. v. Ward*, [1963] 3 All E.R. 835 C.A.

3. *Per Kay, L. J., Re Ray* [1896] 1 Ch. 468; Stroud’s *Judicial Dictionary*, 3d ed. 1952, vol. I, 220-221; Wharton’s *Law Lexicon*, 14th ed. 1953, 91.

4. “Usury” originally meant any reward taken for the use of money. Later, the term has been usually applied to the taking of exorbitant interest, or of interest of a greater amount than is allowed by law. See Wharton’s *Law Lexicon*, 14th ed. 1953, 1034.

5. See Stroud’s *Judicial Dictionary*, 3d ed. 1952, vol. I, 220-221.

6. Wharton’s *Law Lexicon*, 14th ed. 1953, 91.

7. Pronounced, “ass-your-ed” in British Courts.

8. Wharton, *ibid.*, 91.

9. *Ibid.*, 524.

interest in the future sufficient to make a contract one of insurance rather than of wager.

By insurance one cannot insure that the thing insured shall not be lost, burnt or otherwise destroyed but what is insured is that a sum of money shall be paid upon the happening of a certain event.¹ A contract of insurance will normally be construed as a contract of indemnity.² A policy may, however, by express terms, provide that the assured will be able to recover the agreed value which may be more than the actual loss that may have been incurred. Where the loss has been only partial and not total he can, because of express terms, recover a proportion of the agreed value,³ provided however the contract of insurance is not deemed to be, because of gross overvaluation, one of wager or void on any other ground or voidable in favour of the insurers because of gross over-valuation caused by misrepresentation or non-disclosure of a material fact.⁴ But as it has been held in *Williams v. North China Insurance Co.*, (1876) 1 C.P.D. 757 (*per* Cockburn, C.J., at p. 764) and *Badriprasad v. State of Madhya Pradesh*, A.I.R. 1966 S.C. 58, when an insurance (marine) is effected without authority of one person on another's behalf, the principal may ratify the insurance even after the loss is known.

The (Indian) Marine Insurance Act, 1963, has been passed with effect from 1 August, 1963. A policy of marine insurance may be valued or unvalued. Whether a given policy is a valued policy is a matter of construction.⁵ A policy is valued when the policy, in terms, puts a value on the thing insured. It is open or unvalued when it does not mention the value and therefore, in case of loss, the value has to be proved.

In the absence of a statutory prohibition, an oral contract of insurance for a valuable consideration is valid.⁶ Though the term 'policy', a word of French origin⁷ and imported into England by Italian traders, is generally used to describe a formal document embodying the contract of insurance, it may be used to describe any contract of insurance, however informal.⁸

Section 7 of the Indian Stamp Act, 1899, laid down certain ingredients in order to constitute a valid contract for a sea-insurance or sea-policy. Now see Marine Insurance Act, 1963, Sections 25 and 26. Contracts for sea-insu-

1. *Prudential Insurance Co. v. I. R. C.*, [1904] 2 K. B. 658.

2. *Castellain v. Preston*, (1883), 11 Q. B. D. 380, 386; *Matthey v. Curling*, [1922] 2 A. C. 180, 219.

3. *Maurice v. Goldsbrough Mort*, [1939] A. C. 452 P. C.; *Elcock v. Thomson*, [1949] 2 K. B. 755; *Bruce v. Jones*, (1863), 1 H. & C. 769.

4. *Lewis v. Rucker* (1761), 2 Burr. 1167; *Irving v. Manning*, (1847), 1 H. L. Cas. 287, 307, 308; *City Tailors v. Evan*, (1922), 38 T. L. R. 230; *Thames and Mersey Marine Insurance v. Gunford*, [1911] A. C. 529; *Hoff v. De Rougemont*, (1929) 34 Com. Cas. 291.

5. *Blascheck v. Bussell*, (1916) 33 T. L. R. 74; *Brunton v. Marshall*, (1922), 10 Ll. L.R. 689.

6. *Murfit v. Royal* (1922), 38 T. L. R. 334; *Bhugwandass v. Netherlands India Sea & Fire Insurance Co.* (1888), 14 App. Cas. 83.

7. Oxford English Dictionary, vol. VII, 1933, 1071, 'Policy'; Dictionnaire Etymologique, Larousse, Paris, 7th ed. 1938, 571, 'police'.

8. *Re Norwich Equitable Fire* (1887), 57 L.T. 248; *Forikrisgetieselskabet National v. At.-Gen.*, [1925] A.C.639, 642.

rance, other than those referred to in Section 506 of the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60), unless expressed in the form of a sea-policy are void.¹ A verbal contract for sea-insurance is thus unenforceable. The expression of an agreement of sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest and the statutory insistence on a policy is no mere collateral requirement or prescription of the proper way of making such an agreement. In the absence of a policy of sea-insurance a person can have no remedy in regard to a contract for sea-insurance. No suit will lie even for the issue of a policy or for damages for breach of contract in not issuing a policy.² Apart from the statutory requirements, there is no particular form prescribed for a contract or policy of sea-insurance.³

A contract of marine insurance may by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or against any land risk which may be incidental to a sea voyage.⁴

The Indian Insurance Act of 1938, amended by the Insurance (Amendment) Act of 1950, does not define a policy. Fire insurance business has been defined in its Section 2 (6-A). General insurance business, according to Section 2 (6-B), means fire, marine or miscellaneous insurance business whether carried on singly or in combination with one or more of them. Life insurance business has been defined in Section 2 (11); marine insurance business in Section 2 (13-A), and miscellaneous insurance business in Section 2 (13-B) of the Act of 1938 as amended by Act XLVII of 1950.

A policy of insurance is the formal document embodying a contract of insurance.⁵ A policy of insurance is an instrument of recoupment, or mitigation, of loss, effected between the insurer and insured, whereby the insurer agrees to pay money, or make good destruction or damages, or do some other thing, on the happening of some event or events. "It is not, like most contracts, signed, by both parties, but only by the insurer, who on that account, it is supposed, is denominated an 'underwriter'" (Park, *Marine Insurance*, 1).⁶

"Policy of insurance", as regards the Indian Stamp Act, 1899, includes—

- (a) any instrument by which one person, in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event;
- (b) a life-policy, and any policy insuring any person against accident or sickness, and any other personal insurance' (Section 2 (19).

1. Reference (1903) 3 Cal. 565. Now see Marine Insurance Act, 1963, Section 24

2. *Genfosikrings v. Da Costa*, [1911] 1 K. B. 137; *In re National Benefit Assurance Co. Ltd.*, [1929] App. Cas. 114; *Surajmull v. Triton Insurance Co. Ltd.*, A.I.R. 1925 P.C. 83; 52 Cal. 438; 52 Ind. App. 126; 86 I.C. 545; *Fisher v. Liverpool Marine Insurance Co.*, (1874), 9 Q. B. 418.

3. *Tricambji Dambs & Co. v. Verji Kanji* A.I.R. 1923 Bom. 142; *Ahemadshah v. Grindlay & Co. Ltd.*, A.I.R. 1944 Sind 98.

4. Section 2 (20) of the Indian Stamp Act, 1899. Now see also the Marine Insurance Act, 1963, with effect from 1 August, 1963.

5. *Ahemadshah v. Grindlay & Co. Ltd.*, A.I.R. 1944 Sind 98.

6. Stroud's *Judicial Dictionary*, 3rd ed. 1953, vol. 3, 2224.

Though the definition of policy of insurance thus given in Section 2 (19) is comprehensive of all possible cases of insurance, "policy of sea-insurance" or "sea-policy" has been defined in clause (20) of Section 2. "Policy of group insurance" has been defined in clause (19-A) of Section 2.

Endowment policies are insurance policies.¹ A certificate of membership of a Provident Society which secured a payment of money on the death of the member was a policy of insurance.² So also a certificate of membership in the Madras Hindu Family Provident Fund (Limited), and patta or certificate issued by Provident Companies.³ All these definitions are however meant for the purpose of stamp duties.

Under Section 91 of the English Stamp Act, 1891, a policy of insurance includes every writing whereby any contract of insurance is made or agreed to be made or is evidenced, and the expression 'insurance' includes assurance.

"Policy of life assurance", as regards the English Policies of Assurance Act, 1867, means "any instrument by which the payment of moneys, by or out of the funds of an assurance company on the happening of any contingency depending in the duration of human life, is assured or secured (Section 7). "Policy of life insurance", as regards the English Stamp Act, 1891, "means a policy of insurance upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives, except a policy of insurance against accident (Section 98); the latter definition includes an old age endowment with life insurance policy, whereby the assured becomes entitled to a stated sum on his attaining a stated age or his executors to a different sum if he dies under that age."⁴

Pending issue of a formal policy of insurance, the insurers normally give the applicant a formal document known as a "cover note". The cover note usually states that it is to be in force for a limited period of time, or until a policy is delivered, unless meanwhile the insurers give notice to the assured that they have decided not to accept his proposal. The assured also may change his mind and negotiate with another company without affecting the cover already given him by such a note. Insurance brokers who offer insurances of any kind to underwriters do so by means of a *slip* containing short particulars of the risk. The accepting underwriter marks on the slip the amount which he is willing to take and signs or initials it. A slip, unlike a cover note, is not merely a contract of temporary insurance pending inquiries, but is an acceptance of the proposal, binding the insurers to issue a policy in accordance with its terms. In the case of marine insurance this *slip* is nothing more than "honour" contract, because no action can be brought on it by Section 7 of the Indian Stamp Act, 1899, unless and until a stamped policy has been issued. In non-marine cases the *slip* binds the insurers just as a policy would have done had it been issued, and in that

1. *Prudential Insurance Co. v. I. R. C.*, [1904] 2 K. B. 658.

2. *In re the Himat Provident Society, Ltd.*, (1901) 25 Bom. 376.

3. See *Madras Stamp Manual*, 1958, 138.

4. *Prudential Insurance v. I. R. C.*, [1904] 2 K.B. 658

way a *slip* resembles a cover note.¹ See also *Ratilal & Co. v. National Security Assurance Co. Ltd.*, A.I.R. 1964 S.C. 1396.

Section 66 of the Indian Stamp Act, 1899, requires, under an indeterminate penalty of a fine of Rs. 200, a person recovering or taking credit for any premium or consideration for any contract of insurance to make out and execute a duly stamped policy of such insurance within one month after receiving, or taking credit for, such premium or consideration. The law will not allow to make, execute or deliver out any policy which is not duly stamped or to pay or allow in account or to agree to pay or allow in account any money upon, or in respect of, any such policy. Section 67 of the Act punishes with an indeterminate fine of Rs. 1,000 a person drawing or executing a policy of marine insurance purporting to be drawn or executed in a set of two or more, and not at the same time drawing or executing on paper duly stamped the whole number of policies of which such policy purports the set to consist.

A policy is a contract to indemnify the insured in respect of some interest of his against the perils to which the interest in question is or may be subject.² Except in the case of a "lost or not lost" contract of insurance, where interest is required by the contract, the assured, in order to recover, has to prove interest *at the time of the loss*.³ As seen above, a contract of marine insurance can be satisfied by principal even after the loss is known. An event wherein the assured has no interest cannot be insured. In cases of life insurance the English law requires that the assured must have interest *at the time of the contract*.⁴

A man can insure his own life even though he intends, when insuring, to assign the policy to another person.⁵ A person as the assured cannot however merely lend his name to another in order to entitle that other person to pay the premium and take the benefit of the policy.⁶ A husband can insure his wife's life and a wife her husband's.⁷ A father has no insurable interest in the life of his son as such;⁸ nor a son in the life of his father or mother as such.⁹ Partners have an insurable interest in each other's lives and may thus insure against the loss likely to arise on the death of a copartner by the withdrawal of his capital from the

1. See Chitty's *Mercantile Contracts*, 1955, 567.

2. *Wilson v. Jones*, (1867), 2 L.R. 2 Ex. 139, 150.

3. *Anderson v. Moir* (1876) 1 App. Cas. 713; *Sutherland v. Pratt* (1843), 11 M. & W. 296; see also the proviso to Section 6(1) of the English Marine Insurance Act, 1906.

4. *Dalby v. India and London Life* (1854), 15 C.B. 365.

5. *Wainright v. Bland* (1835), 1 Moo. & Rob. 481; (1836) 1 M. & W. 32, *M'Farlane v. Royal London Friendly Society* (1886), 2 T.L.R. 755.

6. *Shilling v. Accidental Death* (1857), 27 L.J. Ex. 16; (1858) 1 F. & F. 116; *Macdonald v. National Mutual Life of Australasia*, (1906), 14 S.L.T. 173, 249.

7. *Griffiths v. Fleming*, [1909] 1 K.B. 805, 814-817, 819-21; *Reed v. Royal Exchange*, (1795), Peake (Add. Cas.) 70.

8. *Att.-G. v. Murray*, [1904] 1 K.B. 165; *Worthington v. Curtis*, (1875), 1 Ch. D. 419, 423.

9. *Att.-G. v. Murray*, [1904] 1 K.B. 165; *Worthington v. Curtis*, (1875), 1 Ch. D. 419, 423; *Shilling v. Accidental Death*, (1858), 1 F. & F. 116; *Heward v. Refuge Friendly Society*, (1886), 54

partnership.¹ A creditor may insure the due payment of a given debt. A creditor has an insurable interest, to the extent of the amount owing when the insurance is made, in the life of his debtor, and also in the life of anyone else whose death will affect the creditor's security which would be, but for the death of the said person, available to satisfy the debt.² A surety has an insurable interest in the life of the principal debtor,³ or in the life of his co-surety to the co-surety's proportion of the debt;⁴ so also a joint debtor in the life of the the other joint debtor.⁵ A servant has an insurable interest in the life of his employer to the extent of any wages or salary to which he is entitled under a contract of service, and similarly an employer in the life of his servant.⁶

An agent without interest may effect a valid and enforceable contract of insurance on behalf of a principal who has interest, and either the agent or the principal himself can sue upon such a contract.⁷ A trustee may effect and enforce a contract of insurance.⁸ A bailee may also insure the goods bailed.⁹ Where the insurance is effected by the carriers for the benefit of the owner, the latter can enforce the contract of insurance.¹⁰

Bailees such as wharfingers can insure their own goods and goods in trust or on commission, that is, goods with which the assured was entrusted. Mere possession, with responsibility, enables the assured to insure the subject-matter covering also the interest of the owner of the subject-matter insured.¹¹ The owner of a motor vehicle may insure against third party liability incurred in its use by himself or others.¹²

In the case of policies of indemnity, a claim for indemnity will fail if one has no interest at the time of the loss.¹³ Where the interest has been required by statute, the parties cannot, *inter se*, contract themselves out of the statutory

L.T. 644, 646; *Elson v. Crookes*, (1911), 106 L.T. 462; *Harse v. Pearl Life*, [1903] 2 K.B. 92, *Goldstein v. Salvation Army*, [1917] 2 K.B. 291, see also Section 2 of the English Industrial Assurance and Friendly Societies Act, 1948.

1. *Griffiths v. Fleming*, [1909] 1 K.B. 805, 815.

2. *Law v. London Indisputable Life*, (1855), 1 K. & J. 223, *Hebdon v. West*, (1863), 3 B. & S. 579; *Anderson v. Edie*, (1795), 2 Park. Ins., 8th ed. (1842) 914; *Lindenau v. Desborough*, (1828), 8 B. & C. 586; *Henson v. Blackwell*, (1845), 4 Hare 434.

3. *Lea v. Hinton*, (1854), 5 De G.M. & G. 823.

4. *Branford v. Saunders*, (1877), 25 W.R. 650.

5. *Branford v. Saunders*, *supra*.

6. *Hebdon v. Wes* (1863), 3 B. & S. 579; *Turnbull v. Scottish Provident*, (1876), 34 S.L.R. 140. *Simock v. Scottish Imperial Insurance*, (1902), S.L.T. 286.

7. *Provincial Insurance v. Ladur* (1874), L.R. 6 P.C. 224, 244; *Browning v. Provincial Insurance*, (1873), L.R. 5 P.C. 263, 272, 273.

8. *Prudential Staff Union v. Hall*, [1947] K.B. 685.

9. *Waters v. Monarch Fire and Life*, (1856), 5 E. & B. 870; *London and N. W. Ry. v. Glyn* (1859), 1 El. & El. 652; *Snow White Food Product Pvt. Ltd. v. Sohanlal*, A.I.R. 1964 Cal. 209.

10. *Snow White Food Product Pvt. Ltd. v. Sohanlal*, A.I.R. 1964 Cal. 209.

11. *North British v. Moffatt*, (1871) L.R. C.P. 25, 30, 31; *Boehm v. Ball* (1799), 8 T.R. 154, 161; *Marks v. Hamilton*, (1852), 7 Ex 323; *Macaura v. Northern*, [1925] A.C. 619, 628.

12. *Williams v. Baltic*, [1924] 2 K.B. 282.

13. *Coker v. Bolton*, [1912] 3 K.B. 315.

requirement.¹ Insurances by way of wager are void.

Whether the proposal of the assured had been accepted by the insurers is a question of construction.²

In the absence of a binding contract already formed, an offer to insure cannot be accepted after the loss has occurred so as to bind the insurers.³ Where unknown to both the assured and the insurers, the loss has occurred before a binding contract of insurance has been formed, the policy will be void unless it is made retrospective.⁴ Where the intention of the insurers and the assured is made clear, a life policy may be retrospective. Under a "lost or not lost" insurance the loss can be recovered even where it has occurred before the beginning of the term covered by the policy.⁵ Where there has been no concluded contract of insurance, but there has been a provisional cover, a cover note, for example, the assured will be able to recover. See *Ratilal & Co. v. National Security Assurance Co. Ltd.*, A.I.R. 1964 S.C. 1396. Where there has been a binding contract to issue a policy but it has not yet been issued, it is an implied term of the contract that the risk shall not materially change prior to the issue.⁶ The doctrine of frustration not being applicable to contracts of insurance, the risk may materially alter to the prejudice of the insurers between the execution of the policy and the commencement of the risk. Where the loss has occurred, known to the assured but not known to the insurers before the issue of the policy, the insurers can avoid the contract.⁷ The loss must occur during the term of the insurance.⁸

A claim under a policy of indemnity is a claim for unliquidated damages.⁹ In the case of a valued policy, the measure of indemnity is the agreed value. In the case of an unvalued or open policy, the measure of indemnity in respect of the loss of the property is determined by its value of the date and at the place of the loss. The market value of the loss, cost of restoration, cost of repairs, cost of refixation and such other factors form the measure of indemnity according to the nature of the respective cases.¹⁰

1. *Anctil v. Manufacturers' Life*, [1899] A.C. 604; *Gedde v. Royal Exchange*, [1900] 2 Q.B. 214.

2. *Ram Dev v. Lakshmi Insurance Co. Ltd.*, A.I.R. 1962 Punj 125.

3. *Canning v. Farquhar*, (1886), 16 Q.B.1. 727.

4. *Pritchard v. Merchant's Life*, (1858), 3 C.B. (N.S.) 622; *Scott v. Coulson*, [1903] 2 Ch. 249.

5. *Oceanic Steamship Co. v. Faber*, (1907), 23 T.L.R. 673.

6. *Harrington v. Pearl Life*, (1914), 30 T.L.R. 613.

7. *Canning v. Farquhar*, (1886), 16 Q.B.D. 727.

8. *Moore v. Evans*, [1918] A.C. 185; *Fooks v. Smith*, [1924] 2 K.B. 508; *Ellerbeck Collieries v. Cornhill Insurance*, [1932] 1 K.B. 401.

9. *Jabbour v. Custodian of Israel Absentee Property*, [1954] 1 W.L.R. 139, 143.

10. *Chapman v. Pole*, (1870), 22 L.T. 306; *Re Wilson and Scottish Insurance*, [1920] 2 Ch. 28; *Rice v. Baxendale* (1861), 7 H. & N. 96, 101; *Re Wright and Pole* (1834) 1 Ad. & El. 621; *Re Egmont's Trusts*, [1908] 1 Ch. 821, 826; *Westminster Fire v. Glasgow Provident*, (1888), 13 App. Cas. 699, 713; *Andrus v. Patriotic Assurance*, (No. 2) (1886), 18 L.R. Ir. 355, 366; *Elcock v. Thomson*, [1949] 2 K.B. 755; *Vance v. Forster* (1841), Ir. Circ. Rep. 47; *Castellin v. Preston*, (1883), 11 Q.B.D. 380, 400.

A life insurance policy is not a contract of indemnity.¹ A policy of insurance against accidents, unless otherwise in terms, is not a contract of indemnity.²

A guarantee insurance is distinguished from a guarantee by a surety. An insurer promises to indemnify a creditor if he is not paid, whereas a surety promises him that he will be paid. Where, on default of the debtor, the intention is that the surety should pay the original debt, the contract is one of guarantee. In a contract of insurance, on the other hand, on default of the debtor, a new debt arises payable by the insurer.³

Fidelity policies are contracts of guarantee insurance. By a fidelity policy a master protects himself against breaches of confidence on the part of his servant.⁴ Such a policy is distinguished from a policy against liability incurred through a servant's negligence.⁵ The same policy may however cover both of these types of losses.⁶ In fidelity insurance it is the date of the misappropriation, not its discovery, that must fall within the term of the policy.⁷ Where the scope of duties of a servant has been changed or widened the fidelity policy will not avail the assured.⁸ In the absence of a stipulation to the contrary, prosecution of the servant is not a condition precedent to recovery under a fidelity policy.⁹

Insurance is a contract *uberrimae fidei*. A contract of insurance is a contract based upon the utmost good faith; and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.¹⁰ The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. The assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure the insurer may avoid the contract. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. Whether any

1. *Dalby v. India and London Life* (1854), 15 C.B. 365. 387; *Law v. London Indisputable Life*, (1855), 1 K. & J. 223.

2. *Bradburn v. G. W. Ry.*, (1874), L.R. 10 Ex. 1, 2; *Port Glasgow Sailcloth Co. v. Colodonian Ry.*, (1892), 29 Sc. L.R. 577; *Theobald v. Railway Passengers' Assurance*, (1854), 10 Ex. 45; *Blaschek v. Bussell* (1916), 33 T.L.R. 74.

3. *Trading Indemnity Co. v. Workington Harbour Board*, [1937] A.C. 1, 16, 17; *Seaton v. Health*, [1899] 1 Q.B. 782, 792, 793; *Re Denton's Estate*, [1904] 2 Ch. 178, 188; *Dane v. Mortgage Ins. Corp.*, [1894] 1 Q.B. 54; *Re Law Guarantee Trust*, [1914] 2 Ch. 617.

4. *Davies v. Hosken* (1937) 53 T.L.R. 798.

5. *Goddard and Smith v. Frew*, [1939] 4 All E.R. 358; *Re Norwich Provident* (1878), 8 Ch. D. 334, 341; *Walker v. British Guarantee Association*, (1852), 21 L.J. Q.B. 257.

6. *Wasserman v. Blackburn*, (1926), 43 T.L.R. 95; *Lazard Bros. v. Brooks*, (1932) 38 Com. Cas. 36 H.L.

7. *Allis Chalmers v. Fidelity Deposit* (1916), 32 T.L.R. 263 H.L.

8. *Wembley U.D.C. v. Poor Law Mutual* (1901), 17 T.L.R. 516; *Cosford Union v. Poor Law Mutual* (1910), 103 L.T. 463.

9. *London Guarantee Co. v. Fearnley* (1880), 6 App. Cas. 911.

10. See Section 17 of the English Marine Insurance Act, 1906 (6 Edw. 7. Ch. 41); and Sections 19-22 of the (Indian) Marine Insurance Act., 1963.

particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact. The term 'circumstance' includes any communication made to, or information received by the assured.¹ According to the English Marine Insurance Act, 1906, Section 18 (3), in the absence of inquiry the following circumstances need not be disclosed, namely:—(a) Any circumstance which diminishes the risk; (b) Any circumstance which is known or presumed to be known to the insurer. The Insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (c) Any circumstance as to which information is waived by the insurer; (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

The above principles apply to policies of every kind, whatever risk be insured against. They apply to every policy by reason of the nature of the contract of insurance.² Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and from his believing the contrary.³ Concealment or misrepresentation renders the contract voidable at the option of the party prejudiced. The party alleging concealment or misrepresentation must adduce evidence in support of his plea.⁴

The non-disclosure of a fact material to the risk enables the insurers to avoid the whole contract.⁵ Once the aggrieved party knows all the facts and has had a reasonable time in which to make up his mind, he must make his election once and for all.⁶

The duty of disclosure continues upto the moment when a binding contract is concluded or on the occasion of each renewal.⁷ The duty to disclose extends to agents of the assured who are employed by him actually to make the contract on his behalf.⁸

Unless the insurer expressly questions the assured, the latter is not bound to

1. See Section 18 of the English Marine Insurance Act, 1906.

2. *Cantiere Meccanico v. Janson*, [1912] 3 K.B. 452, 467 C.A.

3. *Carter v. Boehm* (1765), 3 Burr. 1905.

4. *Williams v. Atlantic Assurance Co., Ltd.*, [1933] 1 K.B. 81, 94, C.A.; *Visschers v. Scottish Metropolitan Assurance Co.*, (1922), 27 Com. Cas 198 C.A.; *Morrison v. Universal Ins. Co.* (1873), L.R. 8 Ex. 197, Ex Ch., *Brooking v. Maudslay*, (1888), 36 Ch. D. 636, 643.

5. *Re Bradley and Essex Accident*, [1912] 1 K.B. 415, 430; *Provincial v. Morgan*, [1933] A.C. 240, 250; *Dalglish v. Jarvie*, (1850), 2 Mac. & G. 231, 243; *Morrison v. Universal Marine*, (1872) L.R. 8 Ex. 40; *Joel v. Law Union*, [1908] 2 K.B. 863, 886; *Merchants and Manufacturers Insurance v. Hunt*, [1941] 1 K.B. 295, 313; *Glasgow Assurance v. Symondson*, (1911), 104 L.T. 254, 258.

6. *Evans v. Bartlam*, [1937] A.C. 473, 483; *Mac Cormick v. National Motor* (1934), 40 Com. Cas. 76, 81, 82; *Simon, Haynes v. Beer* (1946), 78 Ll. L.R. 337; *Bilbie v. Lumley*, (1802), 2 East 469; *Scottish Equitable v. Buist* (1877), 4 R. (Ct. of Sess) 1076.

7. *Whitwell v. Autocar Fire* (1927), 27 Ll. L.R. 418, *British Equitable v. G.W.R.* (1869), 20 L.T. 422; *Allis Chalmers v. Fidelity Deposit* (1916), 32 T.L.R. 263 H.L.; *Looker v. Law Union*, [1928] 1 K.B. 554.

8. *Blackburn v. Haslam*, (1888), 21 Q.B.D. 144, 153; *Blackburn v. Vigors*, (1887), 12 App. Cas. 531, 541.

disclose facts which he does not know or which diminish the risk or which are within the knowledge of the insurer. Actual knowledge is not essential if the insurer had means of knowing the fact, or if he ought to have known it.¹ 'Forbearance to ask questions on the part of the insurer in certain circumstances is tantamount, in the eye of the law, to waiver.'²

A material innocent misrepresentation by a party enables the other party to avoid the contract of insurance.³

Insurance being a contract *uberrimae fidei*, a fraudulent claim made under it gives the insurers a right to avoid the policy. The assured as well as his trustee cannot recover at all upon a fraudulent claim.⁴ Mere exaggeration is not conclusiveness of fraud.⁵ Fraud may be inferred from gross negligence.⁶ Where a policy is taken out by two persons jointly interested in the property, a fraudulent claim on the part of one of the assured disentitles the other assured to recover. In case of a composite policy covering the interests of several persons a fraud on the part of one assured does not necessarily prejudice the other assured.⁷

A policy may contain exceptions or excepted perils as limitations on the risk covered.⁸ Whether a given term in a policy amounts to a condition precedent to the assured's right of recovery is a matter of construction.⁹ By its very nature a condition precedent requires its fulfilment, even though its performance was not material to the risk undertaken by the insurer.¹⁰ Where notice of loss is to be given 'as soon as possible', the Court will take

1. Section 18(3) of the English Marine Insurance Act, 1906; *Wheelton v. Hardisty* (1857), 8 E.B. 232, 271—73; *Hearts of Oak Building Society v. Law Union Insurance*, [1936] 2 All E.R. 619, 625; *Carter v. Boehm* (1766), 3 Burr. 1905, 1910; *Bates v. Hewitt* (1867), L.R. 2 Q.B. 595; *Joel v. Law Union*, [1908] 2 K.B. 863, 876, 879; *Foley v. Tabor* (1861), 2 F. & F. 663, 672.

2. *Carter v. Boehm* (1766), 3 Burr. 1905, 1910; *Greenhill v. Federal Insurance*, [1927] 1 K.B. 65, 85.

3. *Graham v. Western Australian Insurance* (1931), 40 Ll. L.R. 64, 66; *Anderson v. Pacific Insurance*, (1872), 7 C.P. 65, 68; *Golding v. Royal London Auxiliary Insurance* (1914), 30 T.L.R. 350, 351; *Wheelton v. Hardisty* (1857), 8 E. & B. 232; *Barber v. Fletcher* (1779), 1 Doug. K.B. 305; *Life Association of Scotland v. Forster*, (1873) 11 M. (Ct. of Sess.) 351; *Delahaye v. British Empire Mutual Life* (1897), 13 T.L.R. 245; *Thomson v. Weems* (1884), 9 App. Cas. 671; *Merchants and Manufacturers Insurance v. Hunt & Thorne*, [1941] 1 K.B. 295; *Canning v. Farquhar*, (1886), 16 Q.B.D. 727; *Benham v. United Guarantee* (1852) 7 Ex. 744.

4. *Heyman v. Darwins*, [1942] A.C. 356, 365; *Goulstone v. Royal* (1858), 1 F. & F. 276; *Jureidini v. National British*, [1915] A.C. 499; *Re Carr and Sun Insurance* (1897), 13 T.L.R. 186. As to the statutory law on marine insurance in India, see the Marine Insurance Act, 1963, Section 19.

5. *London Assurance v. Clare* (1937), 57 Ll. L.R. 254, 268; *Dome Mining Corporation v. Drysdale* (1931), 41 Ll. L.R. 109; *Central Bank of India v. Guardian* (1936), 54 Ll. L.R. 247; *Shoot v. Hill* (1936) 55 Ll. L.R. 29.

6. *Goodman v. Harvey* (1836) 4 A. & E. 870, 876.

7. *General Accident, Fire and Life v. Midland Bank*, [1940] 2 K.B. 388.

8. *Re Hooley Hill Rubber and Royal*, [1920] 1 K.B. 257, 274; *Lake v. Simmons*, [1927] A.C. 487, 507.

9. *Re Bradley and Essex Accident*, [1912] 1 K.B. 415; *Stonham v. Ocean, Railway and General* (1887), 19 Q.B.D. 237.

10. *Cassel v. Lancashire and Yorkshire Accident* (1885), 1 T.L.R. 495.

into account all existing circumstances.¹ 'Immediately' or 'forthwith' means within a reasonable time and without any unjustifiable delay.² Unless the policy otherwise requires, notice includes oral notice.³ Unless waived by the insurers a warranty must be exactly complied with. It is so even though its breach was immaterial to the risk or the breach was for no fault of or without the knowledge of the assured.⁴ Insurers waiving breach of condition will be estopped from a defence of avoidance.⁵

"Warranty" and "condition" are often used indifferently in contracts of insurance.⁶ See also the (Indian) Marine Insurance Act, 1963, Sections 35-43.

Warranties may be incorporated in the policy itself or included in it by reference to the proposal form or other documents.⁷ No particular form of words is necessary to constitute a warranty if the intention is otherwise clear.⁸ A signed policy may be concluded subject to an oral condition or warranty.⁹ Terms providing that something shall be a condition precedent to the insurers' liability or that if something is not done the policy will be void, ineffectual, ineffective or that the benefits will be forfeited have the effect of warranties.¹⁰ The breach of a warranty relating to a fact or state of affairs warranted to exist at the time of the contract deprives the assured of all rights under the policy in case the insurers choose to rescind. The breach of a warranty as to future facts or states of affairs does not affect any

1. *Verelst's Administratrix v. Motor Union Insurance Co.*, [1925] 2 K.B. 137; 94 L.J. K.B. 659; 133 L.T. 364.

2. *Williams v. Lancashire & Yorkshire Accident* (1902), 51 W.R. 222.

3. *Re Solvency Mutual, Hawthorn's Case* (1862), 31 L.J. Ch. 625.

4. *De Hahn v. Hartley* (1786), 1 T.R. 343, 345, 346; *Philips v. Baillie* (1784), 3 Doug. (K.B.) 374; *Trickett v. Queensland Insurance*, [1936], A.C. 159, 165; *Worsley v. Wood*, (1796) 6 T.R. 710; *Newcastle Fire v. Macmorran*, (1815) 3 Dow. 255; *Maynard v. Rhode*, (1824) 1 C. & P. 360; *Glen v. Lewis* (1853), 8 Ex. 607; *Foley v. Tabor* (1861), 2 F. & F. 663; *Beacon Life v. Gibb*, (1862) 1 Moo. P.C.C. (N.S.) 73; *Jones and James v. Provincial* (1929), 46 T.L.R. 71; *Glicksman v. Lancashire and General*, [1927] A.C. 139, 143; *Thomson v. Weems* (1884), 9 App. Cas. 683, 684; *Dawsons v. Bonnin*, [1922] A.C. 413, 423; *Condogianis v. Guaratan*, [1921] 2 A.C. 125; *Whitehead v. Price* (1835), 2 Cr. M. & R. 447; *Mayall v. Mitford* (1837), 6 Ad. & El. 670.

5. *Hemmings v. Sceptre Life*, [1905] 1 Ch. 305; *British Industry Life v. Ward* (1855), 17 Cl.B. 644; *Ayrey v. British Legal*, [1918] 1 K.B. 136, 142; *Evans v. Bartlam*, [1937] A.C. 473, 483; *Bensten v. Taylor*, [1893] 2 Q.B. 274, 283; *Provincial Insurance v. Leduc* (1874), L.R. 6 P.C. 224; *Wing v. Harvey* (1854) 5 De G.M. & G. 265; *Evans v. Employers Mutual*, [1936] 1 K.B. 505.

6. *Provincial Insurance v. Morgan*, [1933] A.C. 240, 253, 254; *Barnard v. Faber*, [1893] 1 Q.B. 340, 343-345.

7. *Condogianis v. Guardian Assurance Co.*, [1921] 2 A.C. 125; *Rozanas v. Bowen* (1928), 32 Ll.L.R. 98.

8. *Wheulton v. Hardisty* (1858), 8 E. & B. 232, 302; *Barnard v. Faber*, [1893] 1 Q.B. 340, 345; *Dawsons v. Bonnin*, [1922] A.C. 413, 428, 429. See Section 37 of the (Indian) Marine Insurance Act, 1963.

9. *Anglo-Californian Bank v. London and Provincial Marine*, (1904) 10 Com. Cas. 1.

10. *Jones and James v. Provincial* (1929), 46 T.L.R. 71; *Allen v. Universal Automobile Insurance*, (1933) 45 Ll.L.R. 55, 57, 58; *Glen v. Lewis* (1858), 8 Ex. 607; *Thomson v. Weems* (1884), 9 App. Cas. 671.

right which has already vested in the assured at the time of the breach.¹

Money payment or a liability to contribute in the case of a mutual insurance to the losses of other members may be the premium constituting the consideration for the contract of insurance.² Where the premium is payable periodically, the "days of grace", where allowed in the policy, do not extend the term of the insurance.³

Where the policy was voidable, the assured rejecting the contract, unless he was entitled to rectification of the policy, is allowed to recover the premium paid by him.⁴ So is in the case of a void policy.⁵ So also in the case of non-existent policy.⁶ So also in the case of a policy which is void because of the non-existence of the subject-matter of insurance at the time of the contract.⁷

Where the risk can have never attached and the insurer rescinds the policy for breach of warranty the premiums paid are recoverable.⁸ Where the risk has already attached and the insurer rescinds the policy for breach of warranty relating to the future, the premiums paid before the breach cannot be recovered.⁹ Premiums paid after the breach to cover future periods can be recovered.¹⁰

Where the misrepresentation is an innocent one or where the non-disclosure does not amount to a fraudulent concealment, and the insurers avoid the policy, the risk not having attached, the premium is recoverable.¹¹ In case of fraudulent misrepresentation or fraudulent non-disclosure on the part of the assured the premiums are not usually recoverable even though the risk has never attached.¹²

Premiums paid under an unlawful policy are not recoverable.¹³ Where however the assured gives notice to the insurers abandoning the contract before the risk has begun to run, the premiums paid under an unlawful

1. *Union Insurance of Canton v. Willis* [1916], 1 A.C. 281, 286, 287.

2. *Lion Mutual Marine v. Tucker* (1883), 12 Q.B.D. 176, 187, *Great Britain, 100 A 1 Insurance v. Wyllie* (1889), 22 Q.B.D. 710, 722.

3. *McKenna v. City Life*, [1919] 2 K.B. 491.

4. *Fowler v. Scottish Equitable Life* (1858), 28 L.J. Ch. 225, *General Accident Insurance v. Cronk* (1901), 17 T.L.R. 233.

5. *Re Phoenix Life* (1862), 2 J. & H. 441, *Flood v. Irish Provident Assurance* (1912), 46 Ir. L.T. 214; *Kelly v. Solari* (1841), 9 M. & W. 54.

6. *Lower Rhine Insurance v. Sedgwick*, [1899] 1 Q.B. 179.

7. *Pritchard v. Merchant's Life* (1858), 3 C.B. (N.S.) 622, 645; 140 E.R. 885, 894.

8. *Thomson v. Weems* (1884), 9 App. Cas. 671, 682.

9. *Annen v. Woodman* (1810), 3 Taunt. 299; *Langhorn v. Cologan* (1812), 4 Taunt. 330.

10. *Sparenborg v. Edinburgh Life*, [1912] 1 K.B. 195, 204.

11. *Anderson v. Thornton* (1853), 8 Ex. 425; *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484, 507; *Biggar v. Rock Life*, [1902] 1 K.B. 516, 526.

12. *Anderson v. Thornton* (1853), 8 Ex. 425; *Anderson v. Fitzgerald* (1853), 4 H.L. Cas. 484, 507; *Biggar v. Rock Life*, [1902] 1 K.B. 516, 526; *Chapman v. Fraser*, (1793) 1 Park (8th edn.) 456; *London Assurance v. Mansel* (1879), 11 Ch. D. 363, 372; *Whittingham v. Thornburgh* (1690), 2 Vern. 206; 23 E.R. 734. *Prince of Wales Assurance v. Palmer*, (1858) 25 Beav. 605.

13. *Louvy v. Bourdieu* (1780), 2 Dougl. 468, 470; *Howard v. Refuge Friendly Society* (1886), 54 L.T. 644; *McCulloch v. Royal Exchange*, (1813) 3 Camp. 406.

policy are recoverable.¹ Premiums are also recoverable where the unlawful insurance contract has been entered into by the parties under a mutual mistake of fact, believing it to be a lawful one.² Where, again, the assured, who was himself blameless, was induced to make the contract by the fraud of the insurer the premium is recoverable.³

Where the contract is illegal and the parties are *in pari delicto* neither the insurance money nor the premiums paid are recoverable.⁴

Where answers given by the insured are wilfully untrue and he was proposing to obtain through them a policy of insurance on his life, they are in the nature of fraud and therefore the basis of the contract of insurance is gone, and the insured and his representatives have no rights under it. A waiver is an intentional relinquishment of a known right, or such conduct as warrants an inference of such relinquishment: and there can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. The burden of proof of such knowledge is on the person who relies on the waiver. A presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. Possession of the means of knowledge will not be sufficient to constitute waiver but actual knowledge of the material fact must be proved. Where a person seeks to get rights under a policy of insurance on the ground that the insurance company has waived their rights to challenge the validity of the policy by accepting premiums, strict proof of waiver is required and the burden of proof lies upon the person who alleges it. It is not sufficient merely to prove that the insurance company had the means of knowing that a previous proposal for insurance had been rejected by another Company; but it is also essential to show that they actually had this knowledge at all material times and that they knowingly condoned the conduct of the assured in furnishing them with incorrect information. It must be shown that the premiums were taken intentionally with knowledge of the untrue statements in the proposal.⁵

Uberrima fides.—‘Uberrima fides’ means most abundant good faith. Contracts said to require *uberrima fides* are those entered into between persons in a particular relationship, as guardian and ward, solicitor and client, insurer and insured; and contracts of suretyship and partnership, though not strictly contracts *uberrimae fidei*, are, when once entered into, such as to require full disclosure and the utmost good faith. A contract for sale of land is not in every respect *uberrimae fidei*.⁶

¹ *Lowry v. Bourdieu* (1780), 2 Dougl. 468, 470.

² *Oom v. Bruce*, (1810) 12 East 225, 226; *Hentig v. Stanforth* (1816), 5 M. & S. 122, 123—5

³ *Howarth v. Pioneer Life* (1912), 107 L.T. 155, *British Workman's Assurance v. Cunliffe* (1902), 18 T.L.R. 502; *Hughes v. Liverpool Victoria Friendly Society* [1916], 2 K.B. 482.

⁴ *Allkins v. Jube* (1877), 2 C.P.D. 375; *Lowry v. Bourdieu* (1780), 2 Dougl. 468, 470; *Paterson v. Powell* (1832), 9 Bing 320

⁵ *Western India Life Insurance Co. Ltd. v. Asima Sarkar*, A.I.R. 1942 Cal. 412.

⁶ *Wharton's Law Lexicon*, 14th ed., 1953, 1020.

Contracts of insurance and damages.—Contracts of insurance are of the class of contracts *uberrimae fidei*. They are accordingly voidable on a number of grounds as they constitute a class of special contracts. Whether on the part of the assured or of the insurer, failure to disclose a fact material to the risk will entitle the party aggrieved, when the matter comes to his knowledge, to choose either to carry on with the contract or to rescind it. But the duty to disclose is not an implied term of the contract itself.¹ Non-disclosure or fraud renders the contract of insurance voidable. Non-disclosure by itself does not give rise to claim for damages. Avoidance of the whole contract is the only remedy.²

Subrogation.—Subrogation is the doctrine in the law of insurance whereby, as between insurer and insured, the insurer is entitled to the advantage of every right of the insured, connected with the insurance which was effected between them.³

In *Castellain v. Preston* (1883), 11 Q. B. D. 380 C. A., it was observed that according to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.⁴

In *re Miller, Gibb & Co.*, [1957] 1 W. L. R. 703, the policy was one of indemnity, and as result of the payment made by the Export Credits Guarantee Department of the Board of Trade to the company, the Department by reason of the nature of the contract became subrogated to the rights of the company.

In *Mayhew and Gent v. Crickett* (1818), 2 Swanst 185. 1 Wils. Ch. 418 : 19 R. R. 57 : Mews' Digest, xvi, 387, 430, 503, 504, 525, it was held that a creditor cannot avail himself of a security obtained under an agreement, for a further advance, which he afterwards refuses.

In *Forbes v. Jackson* (1882), 19 Ch. D. 615, the surety was entitled to have a transfer of all the securities on paying what was due upon the mortgage of December, 1854.⁵

In *Marlow v. Pitfield* (1719), 1 P. Wms. 558: Mews' Digest, x, 1087, 1099, an infant borrowed money and applied it towards payment of his debts for necessities; the infant was liable to pay this in equity though not in law.

1. *Joel v. Law Union*, [1908] 2 K.B. 863, 886; *Merchants and Manufacturer Insurance Hunt & Thorne*, [1941] 1 K.B. 295, 313.

2. *Glasgow Assurance v. Symondson*, (1911), 104 L.T. 254, 258.

3. Wharton: *Law Lexicon*, 14th ed., 1953, 960.

4. Contract of indemnity.

5. *Per Hall, V.-C.*

In the said case, after the infant had come of age, he devised lands for payment of his debts. The said debt was within the trust.

In *Lewis v. Alleyne* (1888), 4 T. L. R. 560 C.A., it was observed by Lindley, L. J., that in equity, the person who advanced necessities to an infant was in the position of a legal creditor, and any one who advanced money to an infant for procuring necessities took over the legal debt and was entitled to stand in the position of the legal creditor.

In *Falcke v. Scottish Imperial Insurance Co.*, (1887) 34 Ch. D. 234 C. A., E. mortgaged a policy of life assurance to F, and afterwards filed a petition for liquidation. E's payment of a premium in his character of owner of the equity of redemption could not give him a lien in priority to the mortgage debt. The whole proceeds of sale were to be paid to Mrs. F, without deducting the premium.

In *Butler v. Rice*, [1910] 2 Ch. 277,¹ on the facts, it was presumed that the plaintiff intended to keep the charge alive in his own favour. He was entitled to a charge on the Bristol property for £450, and interest.

In *Ghana Commercial Bank v. Chandiram*, [1960] A.C. 732 P.C., by paying the amount due to the B. bank the appellant Bank became entitled to the benefit of the equitable charge with the same priority for the amount thereby secured over the first respondent's interest as had theretofore been enjoyed by the B. bank. See also *Smith's Leading Cases*, 13th ed., 1929, vol. 1, 156.

In *Exall v. Partridge* (1799), 8 T.R. 308, 310 : Mews' Digest, ii, 821 ; xiii, 1136, it was observed that where a man by compulsion of law is obliged to pay a debt, he has a remedy against those who by law were bound to pay, but did not.

In *In re Cleadon Trust, Limited*, [1939] Ch. 286 one of the two directors of a company paid money at the request of the secretary in discharge of debts owed by two subsidiary companies and guaranteed by the company, in expectation that the company which benefited thereby would repay him. The secretary and the directors were also the secretary and directors of the subsidiary companies. It was observed by Scott and Clauson, L.JJ., (Sir Wilfred Greene, M.R., *dissenting*) that there was no equitable principle which imposed any liability on the company, inasmuch as it had never had anything to do with the transactions and that accordingly the director was not entitled to recover the sums advanced by him.

In *Reid v. Rigby & Co.*, [1894] 2 Q.B. 40, the money had found its way into the defendants' possession, and had been employed for their benefit ; it was money received by them to the use of the plaintiff, and, although the defendants had not been aware that their manager had borrowed the money, the plaintiff was entitled to recover.

In *Marsh v. Keating* (1834), 2 Cl. & Fin. 250 : Mews' Digest, iv, 1222 ; vi, 551 ; xiv, 753 ; 1 Bing. (N.C.) 198, a party whose stock had been sold under a forged power could recover the value as money had and received from the purchaser.

1. *Per* Warrington, J.

In *Bannatyne v. MacIver* [1906] 1 K.B. 103 C.A., it was observed that to the extent to which the money borrowed should be found on inquiry to have been in fact applied in paying legal debts of the defendants, the plaintiff was entitled in equity to stand in the same position as if that amount had been originally borrowed by them. Collins, M.R., and Romer, L.J., at page 109, observed that where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that this act has not been authorized, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.

In *Reversion Fund and Insurance Co. Ltd. v. Maison Cosway, Ltd.*, [1913] 1 K.B. 364 C.A., the managing director of the defendant company was, by the terms of his appointment, prohibited from borrowing money on behalf of the company, unless specially authorized so to do by the company. Without authority from the defendant company, he borrowed money on its behalf from the plaintiff company, which money he applied in discharging existing legal debts of the defendant company. The plaintiff company knew through its officers, when the advance was made, that the managing director of the defendant company had no authority to borrow on its behalf: *Held* by Buckley, L.J., and Kennedy, L.J., (Vaughan Williams, L.J., *dissenting*), that the plaintiff company was entitled to recover from the defendant company the amount advanced notwithstanding its knowledge as before mentioned *Bannatyne v. MacIver*, [1906] 1 K.B. 103, was commented upon and explained.

CHAPTER III

OF CONTINGENT CONTRACTS

31. A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Contingent contract.

Illustration

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Contingent contract.—A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. *A contracts to pay B Rs. 10,000 if B's house is burnt. The contract is a contingent one.*

‘Anything is “contingent” when it is liable to failure on the happening or non-happening of an event, condition, or state of things, e.g., a contingent gift. A contingent debt is one the time for the payment of which may or may not arrive; a debt payable after notice is not contingent, for it is to be supposed that it will be payable at some time (*Clayton v. Gosling*, 5 B. and C. 362 : 108 E.R. 134, 135). A contingent debt or debt payable on a contingency refers to a case where there is a doubt if there will be any debt at all (*Ex. p. Ruffe*, (1872-73) 8 Ch. 997, 1001).’¹

There is a distinction between a case where there is a present obligation under a contract and the performance is postponed to a later date and a case where there is no present obligation at all and the obligation arises by reason of some condition being complied with or some contingency occurring.²

The Court should not imply a condition resolute of the contract when the contracting parties might have inserted an express condition to that effect but did not do so though the possibility that the things might happen as they did was present in their minds when they made the contract.³

In *Rajkishor v. Banabehari*, A.I.R. 1951 Orissa 291, the contract was for sale of a lease-hold in Khasmahal. The contract mentioned that application for sanction for transfer would be presented to authorities in due course. *Held*, that the contract was not contingent upon such permission. In *Sohan Singh v. State Bank of India, Ltd.*, A.I.R. 1964 Punj. 123, the balance consideration was to be paid “as soon as possible but at a time when the former (i.e. the vendee) is in a position to make the payment”. The contract of payment was not a contingent one.

Cases.—The plaintiff’s son who was managing the suit and his pleader made an agreement with one of the defendants that should the plaintiff be

1. Stroud : *Judicial Dictionary*, 3rd ed., 1952, vol. 1, 620.

2. *Jethalal v. Kapur*, A.I.R. 1956 Bom. 74.

3. *Girija v. National Coal Co. Ltd.*, A.I.R. 1949 Cal. 472.

successful in his suit with regard to certain land in possession of that defendant, then the plaintiff should purchase the said land from that defendant for Rs. 300. *Held*, that the agreement was not a compromise but was a contingent contract to purchase, and was, as such, binding on the plaintiff.¹

Where the contract provided that goods were to be taken delivery of as and when the same might be received from the Mills, it could not be construed as if the words were "if and when the same may be received from the Mills". Such a construction would be converting the words which fixed the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all and would virtually make a new contract.²

A agreed to sell, and B agreed to buy certain goods as might be ready for delivery or as might arrive and be deliverable. Should the goods be shipped or arrive late, B was to declare within three days from receipt of notice from A whether he would accept the portion overdue without an allowance. The goods of the contract description did not arrive. *Held*, the use of the words "as might arrive" rendered the performance of the contract conditional upon the event of the arrival of the goods.³

The defendants entered into a contract for sale by them of American parachute cloth of certain description. The goods were stated to be of January and February shipment. The contract further provided: "The goods are to be given delivery of when they arrive". The defendants failed to deliver the goods on account of their non-arrival and therefore the plaintiff sued for damages for breach of contract. By the stipulation that the goods were to be given delivery of when they arrived, the parties were dealing with the mode of performance and not with the question of the very obligation to perform the contract. The contract was therefore an absolute one and not a conditional contract. Hence, there was a breach when the defendants failed to deliver the goods, and the plaintiff was entitled to damages.⁴

In the case of a continuing contract such as a contract of domestic service or a contract of a partnership, the contract might provide that it may be determined at the option of the parties upon certain terms. But in cases of concluded contracts, such as a mere sale of goods, which are in no sense continuing, though the time for performance may extend over a longer or shorter period, the law does not permit one of the parties to say that there is no contract subsisting or enforceable.⁵

The licence of a licensee of a liquor shop is in the nature of a permit granted to him to carry on a trade under certain conditions in respect of goods the carrying on business in respect of which is restricted, and the

1. *Ismael Mahamad v. Daudbhai Musabhai*, (1900) 2 Bom. L.R. 118.

2. *Hurnandras v. Pragraj*, A.I.R. 1923 P.C. 54.

3. *Bissessarwalal v. Jaidayal*, A.I.R. 1949 Cal. 407; *Hollis Bros. & Co., Ltd. v. White Sea Timber Trust, Ltd.*, [1936] 3 All E.R. 895 K.B.

4. *Ranchoddas v. Hirachand & Co.*, A.I.R. 1949 Bom. 356.

5. *Thathiah v. Union of India*, A.I.R. 1957 Mad. 82.

amount of the fee which he pays is for such permission granted to him. The payment of the fee in favour of the Government does not depend on the continuance of a supply of liquor to be sold.¹

In *Antonio Buttigieg v. Inez Faizon*, A.I.R. 1949 P.C. 118 (a case from Malta), the third condition in the agreement read: "The parties hereto do hereby expressly stipulate that this present conveyance is subject to the condition of the transfer of the aforementioned permit, and accordingly, if the Police shall not approve the transfer of the said permit this present conveyance shall be rescinded and of no further effect, and the acquiring firm shall, in consequence, be there and then entitled to the restitution of the aforementioned sum.... Contrarily, as soon as the Police shall have approved the transfer of the said permit... this present conveyance shall become absolute, complete and irrevocable". The police law required a permit from police as well as consent by non-police Board. Both the conditions were distinct. On application by the parties police authorized the transfer and the conveyance was completed. The police however subsequently ordered the production of the Board's consent which was not given with the result that the old permit was not altered, nor new permit given. Rescission of the contract was claimed on the ground that police did not approve the transfer of the permit within the meaning of the condition. *Held*, on construction of the condition that the condition referred only to the approval of the police to the transfer of the permit and not to the grant of a definitive permit in favour of the transferee to use the premises. That necessary approval having been in fact given by the police the conveyance had become irrevocable. The subsequent refusal by the police to act on their approval until certain condition was complied with did not alter the unconditional approval earlier given.

Transfer of Property Act, 1882.—For contingent interest on a transfer of property *see* Section 21 of the Transfer of Property Act, 1882. For transfer contingent on happening of specified uncertain event, *see* Section 23, *ibid.*; for conditional transfer, Section 25; for fulfilment of condition precedent, Section 26; for conditional transfer to one person coupled with transfer to another on failure of prior disposition, Section 27; for ulterior transfer conditional or happening or not happening of specified event, Sections 28 and 29; for condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen, Sections 31 and 32; for transfer conditional on performance of act, no time being specified for performance, Section 33; for transfer conditional on performance of act, time being specified, Section 34.

Frustration and contingent contracts.—*See* under Section 32, *infra*.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

Enforcement of contracts contingent on an event happening.

1. *Ka Ron Lanong v. State of Assam*, A.I.R. 1959 Assam 75.

If the event becomes impossible such contracts become void.

Illustrations

(a) *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

Enforcement of contracts contingent on an event happening.—

Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. *A* makes a contract with *B* to buy *B*'s horse if *A* survives *C*. The contract cannot be enforced by law unless and until *C* dies in *A*'s lifetime. *A* makes a contract with *B* to sell a horse to *B* at a specified price if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse. If, however, the uncertain future event proves impossible the contingent contract becomes void. *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void, that is, unenforceable.

Whether the contract itself embodies an implied condition that on the happening of certain event the contract will stand discharged has to be dealt with having regard to the provisions of Section 32 or other similar provisions of the Contract Act. In dealing with the matter, the circumstances under which the contract was entered into may be relevant only in determining whether such an event has or has not happened so as to justify the court to declare the contract as having been discharged¹

Cases.—*A* entered into a contract to supply Government with timber of a certain quality to be approved by *K*, the Superintendent of the Gum Carriage Factory, for which the timber was required, before acceptance. *K* bona fide tested and rejected the timber tendered. Held, that it was not open to *A* to question the reasonableness of *K*'s refusals to accept the timber or to show that the timber was of the quality stipulated for.² The decision of a person appointed by one party may be validly made a condition precedent for the penalty to be imposed upon the other³ Where the condition precedent of the contract was the arrival of ginned goods, and such goods did not arrive, neither party was bound by the contract.⁴ *R* would become a member of a sugar manufacturing company by purchase of its shares in case he was appointed the sole agent of the Company for the sale of its sugar at a certain centre. *R* signed the application for shares

1. *Ka Ron Lanong v. State of Assam*, A.I.R. 1959 Assam 75.

2. *Secretary of State v. Arathoon* (1879), (1882) 5 Mad. 173.

3. *Aghore Nauth v. Calcutta Tramways Co. Ltd.*, (1885) 11 Cal. 232.

4. *Tribhovandas v. Nagindas*, A.I.R. 1920 Bom. 182.

but was however not appointed the sole agent. The Company later went into liquidation. The agreement on the part of *R* to become a member of the Company having been contingent on the condition of the Company appointing him its sole agent and the condition not having been fulfilled by the Company, *R* was not liable to contribute towards the liquidation.¹

A letter signed by the defendant read: "In consideration of your having at my request acceded to the proposal of the Secretaries... of the Tricumdas Mills Company... to advance to the Mills Rs. 1½ lakhs, I hereby bind myself to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills' block property, and to pay you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you to the Mills". *Held*, that on its true construction the document amounted to a substantial undertaking by the defendant that a loan of Rs. 11 lakhs should be procured and that out of that loan the sum of Rs. 1½ lakhs should be repaid to the plaintiffs.²

Where a contract was a contingent contract and the contingency failed there would be no contract which could be made the basis for a decree for specific performance.³ When parties enter into an agreement on the clear understanding that some other person should be a party to it, no perfected contract is possible so long as this other person does not join the agreement.⁴

A sold part of the mortgaged property to *B* the mortgagee in full satisfaction of certain amount due under the mortgage. *B* leased that property to *A* for a period of six years at a certain annual rent payable on a fixed day of the year and by a separate agreement agreed to reconvey the same property to *A* if he paid the rent regularly and also paid an additional amount agreed before the last instalment of the rent. Excepting the first, no instalment was paid in time. But while accepting the belated payment of rent it was made clear that agreement to reconvey stood cancelled because of non-fulfilment of the conditions of agreement. *Held*, that the terms of the lease and the terms of the agreement stood apart and that in accepting rent after the due date without insisting on the forfeiture of the lease the lessor had not waived his rights under the agreement. *A*, therefore, was not entitled to specific performance of the agreement because he had not fulfilled the conditions of the agreement for re-sale.⁵

A judgment-debtor was released from custody on finding a surety for his production at a specified time. Before the expiration of that time the judgment-debtor died. *Held*, the obligation of the surety was discharged by the death of the judgment-debtor.⁶

1. *In the matter of Jaunpur Sugar Factory, Ltd.*, A.I.R. 1925 All. 658.

2. *Vissani Sons & Co. v. Shapurji*, (1912) 36 Bom. 387 P.C.

3. *Dalsukh v. Guarantee Life and Employment Insurance Co. Ltd.*, A.I.R. 1947 P.C. 182.

4. *Jainarain v. Surajnull*, A.I.R. 1949 F.C. 211.

5. *Annalakshmi v. Shanmugam*, A.I.R. 1946 Mad. 47, *affirmed*, A.I.R. 1950 F.C. 38 *sub nom.* *Shanmugam v. Annalakshmi*.

6. *Krishnan v. Itinan Nayar*, (1901) 24 Mad. 637.

Where a contract stated that certain conditions therein would be void if there should be any fluctuation in the rates issued by a certain syndicate, *held*, that non-issue of the rates by the syndicate due to its ceasing to exist did not bring into operation the condition rendering the contract void.¹

A manager of a banking company represented to the petitioner that if the petitioner took 400 preference shares he would be appointed a cashier in a new branch of the company. In pursuance of this contract, the petitioner applied for 100 only of preference shares. He paid the deposit money and was entered on the register of shareholders. Subsequently, he found himself unable to take up the remaining 300 shares; he was not appointed a cashier in the branch office and the contract was treated as cancelled by the directors. The petitioner having applied to have his name removed from the list of contributories in respect of preference shares, *held*, that the petitioner's application for 100 preference shares was conditional and that he had no intention to become a member of the company when he applied for the shares until he was appointed a cashier in the branch office. He was, therefore, entitled to be struck off the register of preference shareholders and could not be called upon as a contributory on that account.²

A, who was the holder of fifty shares in a limited liability company, entered into an agreement with the company through its managing director, to take 150 more shares, on the conditions (a) that he was to be appointed a "terminal director" of the company and (b) that the business of the company was to be transferred from Meerut, where it had been formed, to Saharanpur. The 150 shares were allotted to A, but he never paid the allotment money, and, though the business of the company was, nominally at least, transferred to Saharanpur, A was never appointed a director. Shortly after this allotment the company went into liquidation. *Held*, that A could not be made a contributory in respect of the 150 shares which he had offered conditionally to take.³

An application for shares was made by the applicant conditional on an undertaking by Bank that he would be appointed a permanent director of the local branch. The shares were allotted to him without fulfilling the conditions. The applicant accepted the position as shareholder by accepting dividends, filing suit to enforce it and by pledging the shares. *Held*, that he could not contend that the allotment was void on ground of non-fulfilment of condition as he had by his conduct waived the condition.⁴

Where a person purchases some shares on condition that he would be appointed Chairman of the Local Board and he is allotted shares and

1. *Toolsidas v. Venkatachalapathy*, A.I.R. 1921 P.C. 46.

2. *Ramanbhai v. Ghashiram*, (1918) 42 Bom. 595.

3. *F. B. Powell v. S. Sen*, (1918) 40 All. 45.

4. *Hargopal v. Peoples Bank of Northern India Ltd.*, A.I.R. 1935 Lah. 691; *Piara Singh v. Peshawar Bank Ltd.*, A.I.R. 1915 Lah 405 followed; *In re Peoples Bank of Northern India, Ltd.*, A.I.R. 1936 Lah. 709

appointed Chairman, but subsequently there is breach of the condition by his dismissal, his remedy is by an action for damages and not for getting his name removed from the register of shareholders.¹ The expression "payable when able" in a contractual agreement does not make the contract of payment a contingent one, but only renders the amount payable within a reasonable time. Hence, in such a case Section 32 has no application.²

To establish that the performance of the contract became impossible it has to be proved that the failure in its performance was due to circumstances beyond the control of the party failing.³ A stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong or, *semble*, of an event brought about by his own act or omission.⁴ Even where a clause in a contract meant that the contract was to become void at the instance of either of the parties, the innocent party would not be precluded from enforcing the contract if the other party alone was in default. The defaulting party could not, by taking advantage of his own wrong, prevent the innocent party from enforcing the specific performance of the contract.⁵

The principle that a party who is guilty of a dereliction of duty should not be allowed to take advantage of the condition which he himself has brought about can apply to cases primarily arising in breaches of valid contracts, or transactions which become void by reason of supervening circumstances. Where, however, there can be no contract, other than a contract in writing and in a specific form, because a party fails to execute the contract with the result that there is no valid contract, the Court cannot by relying upon the rule that a party cannot take advantage of a condition brought about by him, bring into existence a contract which was not made and clothe it with legal validity which it cannot have, in the absence of the form prescribed.⁶

Under an agreement with a limited banking concern, the appellant was appointed the chairman of the company on a term of 20 years from the date of registration of the company on a salary of Rs. 2,000 per month. The appellant was not to be removed from the said office except for fraud or gross mismanagement. After continuing to function for ten years the bank stopped its business following the order of the Central Government. Then in consequence of an application by a creditor of the company, the bank was wound up on the ground that it was unable to pay its debts and an official liquidator was appointed to take charge of the assets of the bank. The question was whether the appellant was entitled to his salary at the contractual rate for the agreed period either absolutely or subject to certain conditions.

1. *In re Peoples Bank of Northern India, Ltd.*, A.I.R. 1936 Lah. 709.

2. *Sohan Singh v. State Bank of India, Ltd.*, A.I.R. 1964 Punj 123.

3. *Ganga Saran v. Ram Charan*, A.I.R. 1952 S.C. 9.

4. *New Zealand Shipping Company, Ltd. v. Societe des Ateliers et Chantiers de France*, [1919] A.C. 1 H.L.

5. *Kandasami Chettiar v. Shanmugha Theaver*, A.I.R. 1949 Mad. 302.

6. *Gordhandas v. Natvarlal Chundulal & Co.*, A.I.R. 1952 Bom. 349.

By Gurtu and Agarwala, JJ., it was held that the contract had not become void because of the banking company going into liquidation. The appellant was deemed to have been dismissed from the office of the chairman (Managing Director) of the bank. In the circumstances that the appellant was not responsible for the ultimate state of affairs which led to the stoppage of the company's business the contract was held enforceable at his instance. The doctrine of frustration of contracts as embodied in Sections 56 and 32 of the Contract Act was not applicable where the default which led to the winding up order was by the bank, which was the promisor. But in a case like this provisions of the Companies Act as well as the principles of justice, equity and good conscience might dictate some deduction.

According to Upadhyā, J., (*dissenting*), it was not the intention of the parties that the appellant should work for the company and receive the remuneration agreed upon even if the company was wound up. According to him, the performance of the contract had become impossible owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. After the order of the Central Government it was no more possible for the company to retain or utilise the services of the appellant as Chairman of the Board of Directors, nor was it possible for the appellant to perform such duties any more. The agreement, therefore, had come to an end and the parties stood discharged from their obligations. No question could therefore arise according to Upadhyā, J., of any payment of salary as claimed by the appellant. It will be submitted that the view of Upadhyā, J., seems to be more reasonable.¹

The defendants contracted with the plaintiffs to supply manufactured piece-goods, subject to the condition that if the defendants were not in a position to deliver the goods or did not give delivery for any reason, the plaintiffs could only treat the contract cancelled but could not ask for damages for the breach. The defendants having failed to fulfil the contract, the plaintiffs sued them in damages. *Held*, that the defendants were bound to justify their refusal to perform the contract since they could not themselves bring about the state of affairs which would avoid the contract.²

Frustration and contingent contracts. - P. N. Mookerjee, J., of the High Court at Calcutta in *Mugnceram Bangur & Co. v. Gurbachan Singh*, A.I.R. 1959 Cal. 576, at page 579, observed that Sections 32 and 56 of the Indian Contract Act embraced the whole of the Indian law on the subject of frustration of contract, Section 32 applying in cases of contingent contracts and Section 56, covering the rest. Under either, however, impossibility is the central or the dominating idea and the determining factor, impossibility in cases of contingent contracts in the happening of the event or events, on which the same depend, and, in other cases, impossibility of the act to be performed under the contract. Illegality or unlawfulness of the

1. *Jwala Prasad v. Jwala Bank, Ltd.*, A.I.R. 1957 All 143.

2. *Chunilal Dayabhai & Co. v. Ahmedabad Fine Spinning and Weaving Co., Ltd.*, (1922) 46 Bom. 806

act is given in Section 56 as a separate ground for frustrations of contract, being comprehended within the above conception of impossibility for that purpose.¹ Mukherjea, J., of the Supreme Court (later, Chief Justice of India), in *Satyabrata Ghose v. Mugneeram Bangur & Co.*, A.I.R. 1954 S.C. 44, at page 48, also observed that in cases where the Court gathers as a matter of construction that the contract itself contained impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether.² Although in English law these cases are treated as cases of frustration, in India they would be dealt with under Section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

While leaving the different schools of English thought as to the *rationale* of the principle of frustration for a discussion under Section 56, *post*, it may be observed that Sections 31 to 36 of the Indian Contract Act while covering contingent contracts seek to lay down the rules governing contracts wherein the happening or non-happening of an event is the decisive factor in the formation of the obligation or determination thereof, and that Section 56 provides that the proven, present or subsequent, impossibility or subsequent unlawfulness, of a promised act will render the contract void, that is, unenforceable. Section 56 also provides, in certain circumstances, for compensation for loss to the promisee. It may also be observed that the principle of frustration as understood in the English common law is a principle which while only partially covering the *referent* of the provisions of Sections 31 to 36 and 56 of the Indian Contract Act also transcends it. Sections 31 to 36 deal *prima facie* with contingencies which are expressly made patent, though not necessarily in writing, whereas the common law principle of frustration appears to concern itself also with the construction of an agreement with an implied contingency as to the existence of which the parties shall have disagreed at the bar of the Court. The Court in the latter case seeks to discover the implied understanding between the parties though neither of them may have been apprehensive that the frustrating event might happen. The implied agreed intention of the parties is as it appears to the Court. Sections 31 to 36 of the Indian Contract Act lays down categorical rules governing particular fact-situations. Where however an implied contingent condition has to be ascertained by the Court for the determination of the rights of a party or the parties it will clearly be a case invoking the application of the common law doctrine of frustration.

For a fuller treatment of 'frustration' *see* under Section 56, *post*.

Onus.—The plea that a contract is a contingent contract has to be alleged and proved by the party who sets it up.³

1. See also *Mugneeram Bangur and Co. v. Gurbachan Singh*, A.I.R. 1965 S.C. 1523.

2. *Mehra & Sons v. Ram Chand Om Prakash*, (F.B.) A.I.R. 1952 Punj. 34, 37.

3. *Nemi Chand v. Harak Chand*, A.I.R. 1965 Raj. 132.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Enforcement of contracts contingent on an event not happening.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Contract contingent on an event not happening.—A contingent contract to do or not to do a thing if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible. *A* agrees to pay *B* a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced after the ship sinks, because the return of the ship is no longer possible.

34. If the future event on which a contract is contingent is

When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person.

the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise

than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*.

Contract contingent on human conduct.—Where a contract is contingent on the way in which a person will act at an unspecified time in future and the said person does a thing which renders it impossible for him to act that way within any definite time, then the law will hold that the contingency will never arise at all. *A* agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The law being monogamous, *C* cannot be now married to *B*. The contingency of *B*'s marrying *C* is therefore considered as to have been rendered impossible, and therefore *A*'s contract to pay *B* a sum of money is discharged. The contract between *A* and *B* is rendered void under Section 32, *supra*. Such would also be the case if *B* herself married *E*. The fact that on the the happening of further contingencies, the death of *D* or the death of *E*, for example, *B* will again be enabled to marry *C* will not postpone the frustration or discharge of *A*'s contract with *B*.

35. Contingent contracts to do or not to do anything if a

When contracts become void which are contingent on happening of specified event within fixed time.

specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Contracts contingent on specified event taking place within specified time.—When a contract has been made contingent on the happening of a specified uncertain event within a fixed time, it becomes void if at the expiration of the time so fixed the specified event has not happened. The contract becomes void also when the said event becomes impossible even within the said fixed time. *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract can be enforced if the ship returns within the period specified. If however the ship is sunk or burnt within the year, its return within the specified period becomes impossible, and the contract of payment by *A* to *B* becomes void.

Contracts contingent on specified event not taking place within specified time.—When a promise is contingent on a specified uncertain event not happening within a specified period, it can be enforced when the time so specified has expired but the specified uncertain event has not happened within the period specified. The said promise can be enforced also when it becomes certain that the uncertain specified event will not happen at all. *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The ship does not return within the year. The contract of payment by *A* to *B* can be enforced. The contract becomes also enforceable when the ship is sunk or burnt within the year because its return has been rendered impossible for all time to come.

Cases.—An agreement read: "That debt is settled to-day at Rs. 400 and I would give credit for the sum of Rs. 400 out of my account made on the last day of the month of Ashvin Samvat, 1989." On the contention, *inter alia*, that it was a case of contingent contract as mentioned in Section 35 of the Contract Act, it was held that the agreement only provided a mode of performance and the said provision as to the mode of performance was not collateral to the very obligation to perform the contract which obligation was absolute and unconditional. Whether the account was made at the specified time or thereafter or not and whether any amount was found due to the applicant or not, the debtor was bound to pay the amount.¹ Where a deed

1. *Velji Bharmal v. Samji Poonja*, A.I.R. 1952 Kutch 27.

mentioned the sum and the rate of interest and the period for payment and further recited: "If for any reason we fail to pay the amount during the stipulated time, then in lieu of the aforesaid sum the land is sold to you for the aforesaid amount in full satisfaction". The deed was construed as one of contingent sale. It was a case of an actual sale, subject to the condition that it was not enforceable if the executant paid a certain sum within a certain time. If the payment was ever made, the sale would be void under Section 35.¹

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreements contingent on impossible events void.

Illustrations

(a) *A* agrees to pay *B* 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1,000 rupees if *B* will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

Agreement contingent on impossible event.—When a promise is made contingent on the happening of an impossible event, the promise is void whether the impossibility of the event is known or not to any of the parties to the agreement at the time when the promise is made. *A* agrees to pay *B* one thousand rupees if two straight lines should enclose a space. The enclosing being an impossible phenomenon the promise becomes void and therefore discharged. This is so even when either of the parties was a mathematician or not. *A* agrees to pay *B* one thousand rupees if the latter will marry *A*'s daughter *C*. *C* was dead at the time of the agreement. The promise is void. Section 65 will be applicable in the matter of restitution or compensation. Apart from the applicability of Section 65, the particular circumstances of a given case falling under Section 36 may entitle the promisee, under Section 56, to compensation for loss through non-performance of an act known to be impossible to the promisor. To take an example. *A*, an Indian *zemindar*, promises to pay his cunning manager a sum of five hundred rupees if an unbending and straight iron bar could enclose his garden. Persuading the *zemindar* to believe that it would be possible to so enclose the garden, the manager made the *zemindar* purchase the iron bar of the required length. The enclosing however becomes impossible. Because the manager knew or with reasonable diligence might have known and the *zemindar* did not know that the enclosing would be impossible, under the second paragraph of Section 56, the manager must make compensation to the *zemindar* for any loss which the latter sustained through the non-performance of the enclosing.

1. *Asvath Narayan v. Chumabai*, A.I.R. 1926 Bom. 107.

CHAPTER IV
OF THE PERFORMANCE OF CONTRACTS
Contracts which must be Performed

37. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

Discharge of contracts.—A contract is said to be discharged when the parties thereto are freed from the task of performing their respective obligations as arising from the contract in question. The most desirable method of discharge of a contract is obviously by its precise and exact performance by both the parties concerned. Apart from the precise and exact performance, the parties may by a new and further express agreement between themselves bring the original contract to an end. Quite independent of the parties, a contract may be discharged if a subsequent event renders the performance of the contract impossible or useless. Lastly, in the eye of the law, a breach of the contract also operates as a discharge of the contract. It may be observed that except in the case where a contract has been discharged by its precise and exact performance, or where the parties have chosen by a new and further express agreement to completely absolve each other from the mutual obligations as arising from the original contract, the discharge of a contract though freeing the parties from their original obligations is not always without any incident that will be binding on either or both of the parties concerned. The law of contract being based mostly on principles of justice, the varieties of situations entailing the diverse incidents will be discussed under the appropriate Sections of the Act.

Discharge by express agreement.—The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties which provides for the extinguishment of the earlier rights and obligations. Where the earlier contract was still wholly or partly in the executory stage, the mutual release as per the later agreement happens to form the basis of the validity of such agreement.

Where however a party to the original contract has performed his part of the obligations, for the discharge of the other party some consideration is deemed essential under the English common law. Without some consideration moving from the second party the second agreement will be lacking in its foundation, and as such it will avail him nothing. Only when the second agreement has been made under seal, the question of consideration will not be deemed essential for the purpose of its validity under the English common law. Except when the second agreement has been made under seal the English law requires accord and satisfaction for the unilateral discharge of the party who has received some consideration from the other party under the earlier contract. As to accord and satisfaction *see* below.

Bilateral discharge.—The necessity of bilateral discharge arises when the contractual obligations remain to be performed by both the parties. Both the parties may not have performed any of their obligations, or at least a part of them. When a party has completely discharged his own obligations, the necessity of discharge that may arise is obviously unilateral.

Dissolution simpliciter.—The parties requiring bilateral discharge may achieve their purpose by simply dissolving their original contract. When the parties completely absolve each other from the mutual obligations without entering into any other agreement the case is one of simple dissolution.

Dissolution plus replacement.—The parties while absolving each other from their mutual obligations as arising out of a given contract may extinguish the said mutual obligations by creating fresh mutual obligations by means of a second agreement between them. Here the original contract is replaced by a second one.

Partial dissolution.—The parties to a contract may choose to modify or vary the mutual obligations without totally extinguishing them.

Unilateral discharge.—In the case of a bilateral discharge the mutual release of the rights and obligations as arising out of the original contract forms the basis of the later agreement. In a case where only one of the parties is sought to be discharged, the English common law requires some consideration to be moving from the party sought to be discharged in order to render the discharge effective. Under the English common law the requisite of consideration can be dispensed with only when the release has been given by a deed. Apart from the case of a discharge by means of a deed, the solitary obligation which can be unilaterally discharged in England without a sufficient consideration is the obligation under a negotiable instrument. An obligation under a negotiable instrument can be discharged in favour of the debtor even without any consideration. If the holder of a negotiable instrument or of a promissory note either unconditionally renounces his rights in writing or delivers the instrument to the person liable, the effect is to discharge the obligation of the acceptor or promisor even though no consideration is received.¹ As to the discharge from liability on notes, bills

1. Sections 62 and 89 of the Bills of Exchange Act, 1882.

and cheques in India, *see* Sections 82 to 90 of the Negotiable Instruments Act, 1881. Where by the later agreement the release has been obtained by supplying some consideration, it is called accord and satisfaction. Accord and satisfaction is thus the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.¹

Form of discharge.—The forms of discharging a given contract depends upon the nature of such contract. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence can be given, with exceptions, under Section 91 of the Indian Evidence Act, 1872, in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Indian Evidence Act, 1872. Section 92, again, of the same Act lays down, with some material provisos, that when the terms of any written contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Section 91, no evidence of any oral agreement or statement can be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. Proviso (4) to Section 92 lays down that the existence of any distinct subsequent oral agreement to rescind or modify any written contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to law in force for the time being as to the registration of documents.²

A contract not required to be evidenced by writing may be discharged verbally. A contract though made in a written form can thus be discharged or varied by means of a subsequent oral contract. Subject to the exceptions noted above once a contract has been made in a written form the parties are allowed in law by a subsequent verbal agreement either altogether to waive, dissolve or annul the former agreement, or in any manner to add to, or subtract from or vary or qualify the terms of it, and thus to make a new contract which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.³ When a contract is required by law to be evidenced in writing, a partial dissolution of it must also be effected by a signed memorandum. A verbal

1. *British Russian Gazette, Ltd v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, 643.

2. *Unedmal v. Davu*, (1878) 2 Bom. 547; *see also Narasimhachari v. Indo Commercial Bank, Ltd.*, A.I.R. 1965 Mad. 147.

3. *Goss v. Nugent* (1833), 5 B. & Ad. 58, 65.

variation of a contract required to be evidenced by writing is thus not allowed.¹ A contract which is required to be evidenced by writing may however be completely discharged by a parol agreement.² A parol contract may thus completely dissolve a contract which is required by law to be evidenced by writing but cannot partially vary or modify such contract. When however the object of a verbal contract is to completely extinguish the earlier contract which was required to be evidenced by writing as well as to create a further contract which the law requires to be evidenced by writing, the verbal contract in question will have its effect only in so far as it aimed at completely dissolving the original contract, but will be ineffective in so far as its aim was to create a new contract. This partial ineffectiveness of the verbal agreement is due to the fact that the subject-matter concerned was required by law to be evidenced by writing.³ The second agreement as made verbally may sometimes be so worded as to totally nullify the original contract though without dissolving it in express words. A written contract may be thus rescinded by parol either expressly or by the parties entering into a parol contract entirely inconsistent with the written one, if not entirely inconsistent with it, inconsistent with it to an extent that goes to the very root of it. What is essential is that there should be made manifest in the later verbal agreement the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting. The two agreements, one written and the other verbal, must be such that they cannot stand together, and that upon the face of them the latter cannot be considered otherwise than as a substitution for the former.⁴ Thus without a sufficient consideration a purported accord and satisfaction will not be a valid one in the eye of the law.⁵ Where there has been a sufficient consideration the accord and satisfaction will be effective.⁶ Where the consideration in the accord has been sufficient in the eye of the law it is not material whether the consideration has been actually executed or it is merely executory. The consideration on each side may thus be an executory promise, the two mutual promises making an agreement enforceable in law. An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance, that is to say, a cross action on the contract of accord.⁷

1. *Goss v. Nugent* (1833), 5 B. & Ad. 58; *Vezey v. Rashleigh*, [1904] 1 Ch. 634; *Morris v. Baron*, [1918] A.C. 1, 31.

2. *Goman v. Salisbury* (1684), 1 Vern. 240; *Morris v. Baron*, [1918] A.C. 1.

3. *Robinson v. Page* (1826), 3 Russ. 114.

4. *British and Beningtons, Ltd. v. N. W. Cachar Tea Co.*, [1923] A.C. 48, 62, 67; *Morris v. Baron*, [1918] A.C. 1, 19; *Moore v. Marrable* (1866), 1 Ch. App. 217.

5. *Foakes v. Beer* (1884), 9 App. Cas. 605; *Wilkinson v. Byers* (1834), 1 Ad. & El. 106.

6. *Goddard v. O'Brien* (1882), 9 Q.B.D. 37; *Wilkinson v. Byers* (1834), 1 Ad. & El. 106, 113; *D. & C. Builders, Ltd. v. Rees*, [1965] 3 All E.R. 837 C.A.

7. *British Russian Gazette, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, 644; *Good v. Cheesman* (1831), 2 B. & Ad. 328, 335; *Cartwright v. Cooke* (1832), 3 B. & Ad. 701, 703.

A satisfaction though executory may thus form the basis of a good accord. Where the creditor has accepted in satisfaction of his debt only the debtor's promise to give sufficient consideration the accord is good and effective in favour of the debtor. The discharge of the original cause of action is not deferred till the date when the promised consideration has been in fact given.¹ See *Accord and satisfaction* under Section 62, *post*.

Cases of discharge.—A single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions, as would an act of wilful disobedience.²

The appointment of one of the mortgagees as administrator to the estate of the mortgagor does not extinguish the right of action of the mortgagee other than the one who was appointed administrator and had sufficient assets to satisfy his own share of the debt. The mortgagee administrator could not, however, maintain an action. No interest should be allowed to a mortgagee administrator from the date when sufficient assets became available to him for repayment of the mortgage money.³

Performance of promise.—The parties to a contract are required in law to perform their respective promises unless (1) such performance has been dispensed with by one party in favour of the other or there had been an adequate offer of performance but such offer was not accepted or (2) the performance of the promises was excused under the provisions of the Indian Contract Act or any other law.

Whether performance must be precise and exact.—The most desirable way of discharging a contract is by the precise and exact performance by the parties of their mutual obligations. In many a case the law requires this precise and exact performance.⁴ In such cases, a partial performance by a party entitles him to no payment. Where the complete performance of the contract has been expressly made a condition precedent for the payment, a partial failure fails the party altogether and he cannot recover even upon a *quantum meruit*. The right to payment in such cases arises only when the entire and indivisible contract has been performed in exact accordance with the express terms of the agreement, and not before. Where the parties, for example, have provided that certain work will be done for a

1. *British Russian Gazette, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616; *Morris v. Baron*, [1918] A.C. 1, 35; *Elton Cop Dyeing Co. v. Broadbent & Son, Ltd.*, (1919), 89 L.J. (K. B.) 186.

2. *Laws v. London Chronicle (Indicator Newspapers) Ltd.*, [1959] 2 All E.R. 285 C.A.; *Clouston and Co. Ltd. v. Corry*, [1906] A.C. 129.

3. *Hossainara v. Rahimannetsa*, (1911) 38 Cal. 342, 349-50.

4. *Cunliffe v. Harrison*, (1831) 6 Exch. 903; *Levy v. Green*, (1857), 8 E. & B. 575; English Sale of Goods Act, 1893, S. 30 (1), S. 30 (2), S. 30 (3). *Re Moore & Co. and Landauer & Co.*, [1921] 2 K.B. 519. As to the effect of wrong delivery under the (Indian) Sale of Goods Act, 1930, see Section 37, *ibid*.

lump sum, it cannot be asserted that it was their intention that a reasonable sum should be paid for each part of the work as it was performed.¹

The rule that a contract must be discharged by its precise and exact performance has had some exceptions. The sense of justice being one of the most fundamental bases of the law of contract, the law will protect in certain situations a party against his own failure to perform his obligations to the other party in a precise and exact way as contemplated in the contract. See also under vol. 2, Section 73, for *de minimis* rule.

Prevention of performance by the promisee.—Even where a contract is entire and indivisible and a party has only partially performed his obligations and is then disabled to perform the rest by the fault of the other party he will be paid on a *quantum meruit*.²

Acceptance of partial performance by the promisee.—Though the law requires an indivisible and entire contract to be performed in a precise and exact way in order to enable a party to recover the consideration as promised by the other, it makes exceptions in his favour where there has been an implied contract to pay for partial performance.³ There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work on a *quantum meruit* from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. Where the defendant had had no option but to accept the benefit of the partial performance, the inference of an implied promise to pay on a *quantum meruit* is, obviously, not justifiable.⁴ Where, for example, a work has been done on the land of the defendant, and the circumstances are such as to give him no option as to whether he will take the benefit of the work or not, then necessarily one must look to other facts than the mere taking the benefit in order to ground the inference of a new contract. When the other facts are not there on which an inference of an implied promise for the payment for the partial performance can be founded, the mere fact that the defendant is in possession of what he cannot help keeping, or even has himself done further work upon it, affords no ground for such an inference. He is not bound, for example, to keep unfinished a building which in an incomplete state would be a nuisance on his land.⁵ See also under Section 62.

Substantial performance.—The precise and exact performance of the obligations arising out of a contract, though desirable, is not always possible. The law, therefore, in cases where a party has substantially performed his

1. *Cutter v. Powell* (1795), 6 Term. Rep. 320; *Sinclair v. Bowles* (1829), 9 B. & C. 92; *Britain v. Rossiter* (1879), 11 Q.B.D. 123; *Vigers v. Cook*, [1919] 2 K.B. 475.

2. *Planche v. Colburn* (1831), 8 Bing. 14; *Appleby v. Myers* (1867), L.R. 2 C.P. 651, 661.

3. *Christy v. Row* (1808), 1 Taunt. 300. English Sale of Goods Act, 1893, S. 30 (1); see Section 37 (1) of the (Indian) Sale of Goods Act, 1930.

4. *Munro v. Butt* (1858), 8 E. & B. 738.

5. *Sumpter v. Hedges*, [1898] 1 Q.B. 673.

obligations requires the other party to fulfil his own obligations and will not treat him as discharged without the necessary fulfilment on his part. The party, however, which has only substantially performed his obligations remains liable in damages for the partial non-performance, however small it may be. In spite of this liability in damages for the partial non-performance, the party performing the substantial part will be entitled to enforce the contract.¹ So long as there is a substantial performance, the party doing it is entitled to the stipulated consideration, subject only to a cross-action or counter-claim for the defects or omissions in execution.² Only in exceptional cases where the entire performance on the part of one party has been expressly made a condition precedent for the arising of the obligations on the part of the other the doctrine of substantial performance is not given effect to.³ See vol. 2, Section 73, for *de minimis* rule.

Divisible contracts.—Under the English Common Law, the presumption is that a contract is entire and indivisible, that is, ordinarily no party can demand performance of the obligations from the other unless he himself has fully performed his own or tendered the performance thereof.⁴ The justice of the case as well as traditions have persuaded the Courts to construe certain contracts as divisible. Thus in the absence of any statutory provisions to the contrary, it may be held that a tenant's undertaking to pay rent is enforceable in spite of the fact that the landlord has refused to repair the premises.⁵ Barring the cases of an express agreement to the contrary, certain contracts have been construed as divisible for the purpose of payment. In a contract which is considered divisible payments are recoverable on a *quantum meruit*. Thus, when bricks have been built into a wall and have thus become part of the house, threads stitched into a coat which was under repair and thus have become a part thereof, or planks and nails and pitch worked into a ship under repair and have thus become part of the ship, in the absence of an intention to the contrary, the bricklayer, tailor or shipwright has been allowed to be paid for the work and materials he has done and provided, although the whole work was not complete.

Cases of performance.—On 6th March, 1883, *V* promised to sell 5,000 bags of gingelly seed at Rs. 7-11-0 a bag to *S*. Two-thirds of the price were paid in advance. *V* agreed to deliver the 5,000 bags at the end of April and to give *S* notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and *S* promised to pay *V* the balance of the contract

1. *Boone v. Eyre* (1779), 1 Hy. Bl. 273, n; *Mondel v. Steel* (1841), 8 M. & W. 858, 870. *Dakin (H.) & Co., Ltd. v. Lee*, [1916] 1 K. B. 566.

2. *Hoening v. Isaacs*, [1952] 2 All E. R. 176.

3. *Cutter v. Powell* (1795), 6 Term. Rep. 320; *Sinclair v. Bowles* (1829), 9 B. & C. 92; *Vigers v. Cook*, [1919] 2 K.B. 475; *Hoening v. Isaacs*, [1952] 2 All E. R. 176.

4. *General Billposting Co. Ltd. v. Atkinson*, [1909] A.C. 118.

5. *Menstone v. Athawes* (1764), 3 Burr. 1592; *Roberts v. Havaslock* (1832), 3 B. & Ad. 404; *Appleby v. Myers*, (1867) L.R. 2 C.P. 651, 660; *Taylor v. Webb*, [1937] 2 K.B. 283; [1937] 1 All E.R. 590.

price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract. 3,000 bags were delivered by *V*, but *S* did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May *V* declined to deliver these bags, on the ground that *S* had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to *S* the balance due to him of the money advanced. In a suit by *S* against *V* for damages for non-delivery of 2,000 bags : *Held*, that *V* was not excused from performance of his promise by the failure of *S* to pay the balance due for the bags delivered, and that *S* was entitled to recover the difference between the market and the contract price on the day the contract was broken by *V*.¹

When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month.²

An office clerk engaged on a monthly salary is not entitled to any salary for the broken portion of a month in the course of which he leaves his service without the consent of his employer.³

Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option.⁴

In *Ramalinga v. Jagadannal*, A.I.R. 1951 Mad. 612, it was held that a contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When therefore whether from personal incapacity to contract or the nature of the contract, the contract is incapable of being enforced against one party, the other party is, generally, incapable of enforcing it.⁵ But where there are two adults who enter into a valid contract for sale of land the default of the vendor to produce an encumbrance certificate, as undertaken by her in the contract of sale, should not deprive the purchaser of his right to specific performance and the doctrine of mutuality has no application at all.

In *Scott v. Scott (otherwise Fone)*, [1959] 1 All E.R. 531 P.D.A., the husband and wife were married in April, 1950. At the time of the marriage the husband was a widower, forty-three years of age, and the wife was a spinster forty years of age. Before the marriage the wife was in a safe career which would have entitled her to a pension of £400 a year at the age of fifty-five. Before accepting the husband's proposal of marriage, the wife told him frankly that she had a distaste for the idea of sexual intercourse, and the

1. *Sinson v. Virayya*, (1886) 9 Mad. 359.

2. *Dhume Behara v. Sevenoaks*, (1886) 13 Cal. 80.

3. *Ralli Brothers v. Ambika Prasad*, (1913) 35 All. 132.

4. *Rashik Lal v. Ram Narain*, (1912) 34 All. 273.

5. As to the law in favour of minors see under Section 11, *ante*.

husband gave her to understand that although he hoped to be able in time to persuade her to change her attitude, he would not seek sexual intercourse with her against her wishes, and that even if she did not change her attitude, it would not matter and the marriage would continue. During the first eighteen months or so of the marriage, the husband continued to hope to persuade the wife to accept sexual intercourse, and made a few attempts to have intercourse but desisted on the wife showing that she did not want it from the beginning of 1952 until the end of 1955, the husband accepted the marriage without sexual intercourse, and the parties were happy together.

On a petition by the husband for a decree of nullity on the ground either of the wife's incapacity or, under Section 8 (1) (a) of the Matrimonial Causes Act, 1950, that the marriage had not been consummated "owing to" her refusal, a decree of nullity was refused for the reason that as the husband had fully accepted the marriage despite the absence of sexual intercourse there was a bar arising from his own conduct against his obtaining a decree of nullity, even if he were able to prove either of the issues on which he relied; and in the circumstances of the case the bar, which was a discretionary bar, should be applied.¹ The husband was not entitled to relief under Section 8 (1) (a) of the (English) Matrimonial Causes Act, 1950, although the wife had wilfully refused to consummate the marriage, because non-consummation was attributable to the husband's keeping to the pre-marriage understanding between the parties and was not "owing to" the wife's refusal.

In *Morgan v. Morgan* ((*otherwise Ransom*)), [1959] 1 All E.R. 539 P.D.A., the husband and wife first met in 1953, he being then a bachelor about sixty-seven years of age, and she a spinster about fifty-four years of age. They became friends and saw each other frequently, but showed no physical affection for each other except for an occasional kiss. In 1957, at the wife's suggestion, they agreed to marry on the basis of companionship only. It was also agreed that the wife should continue at her work: the husband was an old-age pensioner. The marriage took place on January 25, 1958, but the wife spent the night after the ceremony alone at a hotel and went away on the following day. The parties never lived together and the marriage was never consummated. At the time of the marriage the husband was incurably impotent, but did not know it until later. At the hearing of a petition by the husband for a decree of nullity on the ground of his impotence, the husband said in evidence that notwithstanding the "companionship" agreement, he had hoped that later on the wife would agree to marital intercourse. The husband was not entitled to a decree of nullity on the ground of his impotence for the following reasons.

(i) having regard to the companionship agreement and the age of the parties when marriage took place, it would be contrary to justice and public policy to allow the husband to plead his own impotence, and

(ii) *mental reservations* could not in English law invalidate a marriage that was duly celebrated, and accordingly the marriage was valid notwithstanding

1. *G. v. M.* (1885), 10 App. Cas. 186, 191; *W. v. R.* (1876), 1 P. D. 410.

the companionship agreement. See also Section 12 of the Hindu Marriage Act, 1955.

In *Mathews v. Kuwait Bechtel Corporation*, [1959] 2 All E.R. 345 C.A., a contract of service made between an employer resident abroad and an English employee expressed to be construed in accordance with English law, provided for services to be rendered abroad by the employee. It contained no express reference to the employer's duties as to standard of care in respect of the premises where the employee was to work, the plant to be used, or the system of work, and a clause provided that "this agreement embodies the whole arrangements between the parties...." The employee suffered personal injuries in the course of his employment and brought an action for damages against the employer. He alleged a breach of contract, by reason of a breach of an implied duty to take care. The action was maintainable at the option of the employee either as an action in tort, or as an action in contract, there being an implied term of the contract imposing a duty to take care on the employer.¹

In November, 1950, the respondents, importers of cloves into Singapore, contracted to sell to the appellants 50 tons of second grade Zanzibar cloves, December shipment, "subject to force majeure and shipment". The respondents did in fact ship in December a quantity of cloves sufficient to fulfil the contract, though not sufficient to meet all their commitments to other buyers. They allocated the cloves among the latter, and delivered none to the appellants, to whom they wrote "your shipment was not effected by the Zanzibar suppliers. Your contract was made subject to...shipment... Please consider your contract as cancelled." On a claim by the appellants for damages for breach of contract of sale, it was held that "subject to shipment" was to be construed as meaning that the contract was conditional upon the respondents being able to procure the shipment in December, 1950, of cloves of the stipulated quantity and description. If the words were to be construed as covering a stipulation when shipment did not take place merely as the result of the arbitrary choice of the vendors, then there would be no contractual force in the document, which would merely give an option to the vendors. The respondents could not be allowed to excuse their non-commitments by reference to their other commitments and to seek to give to their priority over the appellants' claims—the contract made no reference to such commitments and they were no concern of the appellants. Accordingly, when the respondents failed to deliver to the appellants the cloves contracted for, and when they purported to cancel the contract, they committed a breach of it and were liable in damages, the measure of them being the difference between the contract price and the market price at or about the date when the cloves arrived in Singapore.²

1. *Davie v. New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 350; *Lister v. Romford Ice & Cold Storage Co. Ltd.*, [1957] 1 All E.R. 139, 142; *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 642.

2. *Hong Guan & Co. Ltd. v. R. Jumabhey & Sons, Ltd.*, [1960] 2 W.L.R. 754 P.C.

The Australian Sea Carriage of Goods Act, 1924, Sch. art. III, r. 1, read : "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(a) make the ship seaworthy". Where the matter in question was one of building, or rebuilding, or repairing a ship, or the supply of equipment or spare part, the Court could properly be invited to conclude that the carrier had exercised due diligence, upon proof (a) that he had engaged a reputable contractor or supplier, (b) that he had provided for the work to be properly superintended by his own representative, and (c) that such representative, had in fact exercised due diligence. To hold the contrary would, it was observed, lead to absurd results which could not have been in the contemplation of those who had framed the rules. Where the negligent fitter was not the servant of the carriers, there was no room for the application of the principle respondent superior.¹

In the case of a fixed laytime charterparty which imposed on the charterers a duty to load and discharge within the fixed time a wide range of lawful merchandise such as they might select, an exemption clause providing : "... Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of...strikes...connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo..." did not exempt the charterers from seeking an alternative cargo when one cargo became unavailable owing to an excepted peril, but merely excused delay in loading for such time as was reasonably required to obtain the alternative cargo.²

By a port charterparty dated August 27, 1954, the steamship *Aello* was chartered to proceed as ordered by charterers to receive from them a cargo of wheat and/or maize and/or rye "at one or two safe loading ports or places in the River Parana...and the balance of the cargo in the port of Buenos Aires". The charterers did not have a cargo of maize ready to be loaded until October 29. Accordingly, as a *giro* (permit) could not, under the terms of the resolution of September 1, be issued, the ship was compelled to wait at the Free Anchorage until October 29. As the provision of a cargo was necessary to enable the ship to perform its obligation, the charterers were under an absolute obligation to provide a cargo, or a reasonable part of it, in time to enable the ship to perform its obligation under the contract. The charterers were not relieved of that obligation by showing that they had before October 29 taken all reasonable steps to provide a cargo.³

1. *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.*, [1960] 2 W.L.R. 86 C.A.; *W. Angliss & Co. v. P. & O. Steam Navigation Co.*, [1927] 2 K.B. 456: 43 T.L.R. 675 and; *Davie v. New Merton Board Mills Ltd.*, [1959] A.C. 604: [1959] 2 W.L.R. 331: [1959] 1 All E.R. 346, *applied*.

2. *South African Dispatch Line v. Owners of the Panamanian Steamship Niki*, [1960] 2 W.L.R. 294 C.A.; *Bungey Born Limitada Saciedad v. Brightman & Co.*, [1925] A.C. 799: 41 T.L.R. 652: [1924] 2 K.B. 619: 40 L.T.R. 876, *applied*.

3. *Sociedad Financiera v. Agrimpex Hungarian Trading Company, The Aello*, [1960] 3 W.L.R. 145 H.L.; *Ardan Steamship Co. Ltd. v. Andrew Weir & Co.*, [1905] A.C. 501: 21 T.L.R. 723 H.L.

A contract, signed by the defendant on February 19, 1954, for the sale by her to the plaintiff of a 2-acre plot of land in Nairobi, provided, *inter alia*, for payment of a deposit immediately and the balance of the purchase price on presentation of documents of title to be executed by both parties within six months from the date of the contract. The defendant repudiated the contract—and tore it up—within a few minutes of signing it on the ground that she had never agreed to sell the whole 2 acres but only an area of half an acre. On July 2, 1954, some weeks before the last day for completion—August 19—the plaintiff instituted proceedings claiming specific performance of the contract of February 19. The defendant contended, *inter alia*, that the plaint was issued prematurely, and that the plaintiff should have waited until there had been a failure to perform the contract within the period fixed thereby, notwithstanding that she had previously intimated her refusal to do so. It was held that the plaintiff was entitled to an order for specific performance. The fallacy of the defendant's contention consisted in equating the right to sue for specific performance with a cause of action at law. In equity all that was required was to show circumstances which would justify the intervention by a court of equity. The order for specific performance often fell into two parts, the first being of a declaratory nature and the second containing consequential directions. The Court would not, of course, compel a party to perform his contract before the contract date arrived, and would give relief from any order in the event of an intervening circumstance frustrating the contract.¹

As to the specific performance of a contract to deliver specific or ascertained goods, see Section 58 of the (Indian) Sale of Goods Act, 1930.

Where the goods sold were not in their entirety those contracted for, the seller cannot succeed in recovering from the buyer the difference in contract price and price actually recovered.²

In a suit for recovery of money on the basis of a contract, the Court must look into the terms of the contract itself, and into the circumstances and the nature of the contract, in order to draw any inference as to where the parties intended that the money was to be paid.³

The right to be paid a credit balance on a current account is an "accrued right" in the sense in which those words were used by Lord Dunedin in *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 269, despite the need of a formal demand before action can be brought to recover the money. When this right is suspended and not destroyed, by the outbreak of war, and later by legis-

1. *Hasham v. Zenab*, [1960] 2 W.L.R. 374 P.C.; *Roberto v. Bumb*, [1943] 2 D.L.R. 613 (Canada); *Roy v. Kloeffer Wholesale Hardware and Automotive Co. Ltd.*, [1951] 3 D.L.R. (Can.) 122 affirmed in [1952] 1 D.L.R. 158 (Can.) and [1952] 2 S.C.R. (Can.) 465; dictum of Lord Sumner in *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851, at 866; 40 T.L.R. 745 not followed.

2. *Phul Chand v. Jugal Kishore*; A.I.R. 1927 Lah. 693.

3. *Johri Mull v. Hira Lal*, A.I.R. 1961 Pat. 198; *Andinarayana v. Lakshminarayana*, A.I.R. 1940 Mad. 588.

lation vested in the Custodian of Absentee Property, any payment made by the bank of the credit balance to the Custodian is rightly done.¹

Where no stipulation or covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to receive payment of a sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time.²

An agreement for pre-emption where not void for uncertainty or as offending against the rule against perpetuities is enforceable.³

Where at the time of family partition between two brothers it is agreed that if any coparcener wishes to sell his share in the residential house or if his share were sold in any other way, the other coparcener would be entitled to buy it for Rs. 200 such an agreement is enforceable against the son of one of the parties to it. Section 14 of the C.P. Act was no bar against the enforceability of such an agreement because such an agreement creates no interest in the property and by Section 37 of the Contract Act the representatives of the promisor were bound.⁴

Specific performance is a discretionary remedy. When shares of a company are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares.⁵

In a suit in 1901 to recover land from the appellant it appeared that the plaintiff's predecessor in title had in 1895 collusively executed a benami deed of sale thereof to the defendant's predecessor in order to defeat the claim of a prior equitable mortgagee who at once sued the parties to the said benami deed and obtained satisfaction of his claim with costs: *Held* that, the purpose of the fraudulent conveyance having been defeated, the plaintiff was entitled to a decree and the defendant could not rely upon the contemplated fraud as an answer to the action. *Held*, also, that the deed of sale being benami was inoperative and did not require to be set aside.⁶

It is possible in India to put a clause into a mortgage deed allowing sale except through the medium of the Court. At least there is no positive enactment prohibiting such a stipulation being annexed to a mortgage where Section 69 of the Transfer of Property Act does not apply.⁷

In *Sonimull Jeetmull v. R.D. Tata & Co.*, A.I.R. 1927 P.C. 156, it has been held that Section 49 of the Contract Act does not get rid of inferences that would justly be drawn from the terms of the contract itself or from the necessities of the case, involving, in the obligation to pay the creditor, the further obligation of finding the creditor so as to pay him. In *Billoram v.*

1. *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial and Overseas)*, [1954] 2 All E.R. 226 H.L.

2. *Behari Lal v. Ram Ghulam*, (1902) 24 All. 461.

3. *Aulad v. Athar*, (F.B.) (1927) 49 All. 527.

4. *Ratanlal v. Ramanujdas*, A.I.R. 1944 Nag. 187.

5. *Jainarain v. Surojmul*, A.I.R. 1949 F.C. 211.

6. *Petherpermal v. Muniandi*, (1907-08) 35 I.A. 98.

7. *Kanhaya Lal v. National Bank*, A.I.R. 1923 P.C. 114.

Uttamchand Bishandas, A.I.R. 1961 Raj. 93, it was held that in the case of a suit for recovery of a debt the technical rule that the creditors' residence at the commencement of the suit should determine the forum in the absence of a contract to the contrary should not be applied in India. If it is not possible to establish an agreement respecting the place of performance or payment, express or implied, the Court should presume that the place of the creditor's residence at the time of the contract between the parties was implied to be the place of performance or payment.¹ The buyer should ask to have the goods made over to him at the seller's place of business and not at his own.² The place of performance is where goods are to be sent.³ The performance of a contract is part of the cause of action, and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed.⁴

A Court acting under the second paragraph of Section 32 of the Code of Civil Procedure, 1882, was bound by the provisions of Section 22 of the Indian Limitation Act, 1877.⁵ Now *see* the Limitation Act, 1963, Section 21.

If after a contract is concluded one of the parties starts fresh negotiations with a view to introducing new terms, and this is done under mistake but has no effect in altering the conduct of the other party then even if the subsequent negotiations fail the party which attempted to reopen the concluded contract can enforce it specifically.⁶ The subsequent conduct of a party is irrelevant for the purpose of construing an agreement.⁷

There are executed, as distinct from executory, agreements of various kinds in respect of which, even, if their terms do not call for the execution of a further instrument regulating the rights of the parties, the equitable right to specific relief should be tried by principles which are in no way different from those applicable to executory agreements proper.⁸

Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount that has validly passed. The mortgagee by remaining in possession for more than 12 years under such a mortgage, cannot by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount.⁹ Where mortgagor undertook that he would not alienate equity of redemption, and that the mortgagee should not be obliged to receive the money from any one but the original mortgagor, *held*, that as the undertaking absolutely forbade alienation, and thus deprived the mortgagor of a right which was an essential

1. *Tulsiman Bibi v. Abdul Latif*, 63 Cal. 726 : A.I.R. 1936 Cal. 97, and *Bhammal v. Sakhatmal*, A.I.R. 1956 Bom. 111 *dissented from*.

2. *Phul Chand v. Jugal Kishore*, A.I.R. 1927 Lah. 693.

3. *Md. Esuff v. Hateem & Co.*, A.I.R. 1934 Mad. 581.

4. *Champaklal v. Nectar Tea Co.*, A.I.R. 1933 Bom. 179.

5. *Ram Kinkar v. Akhil Chandra*, (F.B.) (1908) 35 Cal. 519.

6. *Jainarain v. Surjmul*, A.I.R. 1949 F.C. 211.

7. *Florris Edridge v. Rustamji Danyibhoy*, A.I.R. 1933 P.C. 233.

8. *Australian Hardwood Pty. Ltd. v. Commissioner for Railways*, [1961] 1 W.L.R. 425 P.C.

9. *Rajai Tirumal Raju v. Pandla Muthial*, (1912) 35 Mad. 114.

incident of the estate he had in the property by virtue of his equity of redemption, it could not be given effect to. When a mortgage debt is contracted in a particular currency, it should be repaid in that currency.¹

Offer of performance.—Even where a party to a contract has not performed his promise but offered to perform the said promise in favour of the promisee he will be in the eye of the law deemed to have performed the promise. An adequate offer of performance is thus tantamount in law to performance itself.²

Where the obligations of a party under a contract cannot be performed without the consent, concurrence, or readiness on the part of the other and that other party has withheld such consent, concurrence, or readiness even though the first party was willing to perform his part, the party making the offer of performance is discharged from any further liability. Thus when the stipulated goods have been offered for delivery in the required quantity but the delivery has not been taken by the contractee, the contractor is not only discharged from any further liability but he is also entitled to recover damages from the contractee. For the purpose of discharge, his tender of performance of the obligations in the circumstances is tantamount to his actual performance thereof. In a contract to deliver goods or pay money one of the parties in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to receive, the act of him who is to deliver or to pay can amount only to a tender. The law, therefore, considers a party who has entered into a contract to deliver goods or pay money to another, as having substantially performed it, if he has tendered the goods or the money provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purported to be.³ This rule as to tender of performance is not wholly applicable in the case of payment. The refusal on the part of the creditor to accept a payment even though tendered in full does not absolve the debtor of his debt. In any action for debt the creditor will be allowed only the amount due and not costs.⁴ For a valid tender of money, the offer must be made in legal tender and to the full extent of the debt. In case of payment in excess, the surplus will be presumed to be forgone in favour of the creditor.⁵ As to when coins issued under the authority of Section 6 of the Indian Coinage Act, 1906, shall be a legal tender in payment or on account

1. *Trimbak Jivaji v. Sakharam Gopal*, (1892) 16 Bom. 599.

2. *Dasharathi v. Abdul Hannan*, (1928) 55 Cal. 624.

3. *Startup v. Mardonald* (1843), 6 Man. & G. 593, 610.

4. *Griffiths v. School Board of Ystradyfodwg* (1890), 24 Q.B.D. 307, *Finch v. Brook*, (1834), 1 Bing. (N.C.) 253, 256; *Farquharson v. Pearl Assurance Co.*, [1937] 3 All E.R. 124; *Dasharathi v. Abdul Hannan*, (1928) 55 Cal. 624.

5. *Robinson v. Cook*, (1815), 6 Taunt. 336.

see Section 13, *ibid.* As to restrictions on foreign exchange, see the Foreign Exchange Regulation Act, 1947.

The practice of the Courts is not to require a party to make a formal tender where from the facts stated or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money.¹

In a case of a sale with an agreement for repurchase on or before a certain specified date, the seller of property offered to repurchase it before that date. But the purchaser denied that there had been agreement to reconvey. It consequently amounted to a complete repudiation of the contract to reconvey. *Held*, in cases of this kind no question of formal tender of the amount to be paid arose and the question to be decided was not whether any money was within the power of the seller but whether the purchaser definitely and unequivocally refused to carry out his part of the contract and intimated that money would be refused if tendered.²

If a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor had not the money or the control of it. But a refusal purporting to be based upon an unenforceable provision in the mortgage, namely, that upon a default the mortgagee can purchase the property for the outstanding amount, is not one which dispenses with the necessity of a tender.³

Dispensation with performance.—A party to a contract need not perform his promise when such performance has been dispensed with by the other party as the promisee. See *Estoppel*, *ante* and *post*. See also under Section 62, *post*.

Waiver.—When a party forbears, at the request of the other, to demand performance of a contract at the agreed date it is called a waiver. A waiver though without a consideration and though not made in writing is binding upon the party at whose instance it was granted.⁴ It is also generally binding on the party granting it.⁵ If a person having contractual rights against another induce the latter by his conduct to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some given period of time, he will not be allowed to enforce the rights until such time has elapsed without at all events placing the parties in the same position as they were in

1. *Venkataraman v. Subdrayamma*, A.I.R. 1923 P.C. 26; *Narain Das v. Rikhab Chand*, A.I.R. 1952 Raj. 72.

2. *International Contractors Ltd. v. Prasanta*, A.I.R. 1962 S.C. 77.

3. *Chalikam Venkatarayana v. Zamindar of Tuni*, (1923) 46 Mad. 108 P.C.

4. *Hickman v. Haynes*, (1875), L.R. 10 C.P. 598; *Ogle v. Earl Vane*, (1868) L.R. 8 Q.B. 272; *Levey & Co. v. Goldberg*, [1922] 1 K.B. 688.

5. *Leather Cloth Co. v. Hieronimus* (1875), L.R. 10 Q.B. 140; *Tyers v. Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Exch. 195; *Panoutsos v. Raymond Hadley Corp. of New York*, [1917] 2 K.B. 473; *Hartley v. Hymans*, [1920] 3 K.B. 475.

before. This means that the voluntary concession can be withdrawn and the original position restored only when a notice has been given intimating the desire of the party granting the concession.¹ A party who has indicated that he is not going to insist upon his strict rights, as a result of which the other party has altered his position, will not be allowed to turn round without notice and insist upon his rights to the inconvenience of that other.²

If a party leads another to believe that he would not insist on the stipulation as to time and that if the latter carries out the work he will accept it, he cannot afterwards set up the stipulation as to time against the latter. By his conduct he evinced an intention to affect the legal relations between the parties. He makes in effect a promise not to insist on his strict legal rights. That promise may be called a waiver or forbearance on his part. It may also be called in certain circumstances an agreed variation or substituted performance. Unless the indulgence given be withdrawn on a reasonable notice, it will operate as a kind of estoppel. Once the promise has been acted upon by the other party, the party granting the concession cannot afterwards go back on it.³ The very fact that the other party has altered his position in pursuance of the indulgence given is deemed to be a sufficient consideration to render the forbearance a valid defence until it has been duly withdrawn.⁴

There can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement. There must be something done which is inconsistent with the continuance of that right.⁵ See also *Dawsons Bank, Ltd. v. Japan Trading Co., Ltd.*, (1935) 13 Rang. 256 P.C.

Legal excuse of performance.—Where there has been a legal excuse, whether such excuse is under the Indian Contract Act, 1872, itself or any other law, for the performance of a promise, the promisor cannot be required in law to perform his promise. See Sections 19, 19-A, 20, 22, 24, 25-30, 35, 36, 56, 57, 62 and 67, among others, of the Indian Contract Act, 1872.

Section 37 is not limited to cases where performance as a whole is excused or dispensed with. It also covers cases of partial performance.⁶ The Hindu

1. *Birmingham and District Land Co. v. L. & N.W. Ry. Co.* (1888), 40 Ch. D. 268, 286; *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657, 660.

2. *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co. Ltd.* [1954] 1 W.L.R. 862, 872; [1954] 3 All E.R. 28, 35.

3. *Richards (Charles), Ltd. v. Oppenheim*, [1950] 1 K.B. 616, 623; [1950] 1 All E.R. 420, 423.

4. *Combe v. Combe*, [1951] 2 K.B. 215; [1951] 1 All E.R. 767. *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130. *Wallis v. Searmark*, [1951] 2 T.L.R. 222. *Bruner v. Moore*, [1904] 1 Ch. 305.

5. *Sheriarji Rabadi v. Bapuji Musa*, A.I.R. 1924 Bom. 264.

6. *Bharyaji Raghobaji v. Damodhar Madhavrao*, A.I.R. 1946 Nag. 336.

law rule of *damdupat* is "other law" within the meaning of Section 37.¹ Where according to Hindu law recovery of more than double the sum lent on interest was not allowable, the payment of more than double the principal was not a pious duty.² The rule of *damdupat* applies to all debt cases including mortgage contracts.³ The rule of *damdupat* applies to Hindus only so long as the relation between the parties is contractual, and ceases to apply when the matter has passed from the realm of contract into that of judgment.⁴ Alienation by father for debt barred at the date of alienation binds sons and grandsons to the extent of the family estate.⁵

Performance and representatives of promisor.—Unless a contrary intention appears from the contract, a promise binds the representatives of the promisor in case the promisor dies without performing his promise. *A* promises to deliver goods to *B* on a certain day on payment of Rs. 1,000. *A* dies before that day. *A*'s representatives are bound to deliver the goods to *B*, and *B* is bound to pay the Rs. 1,000 to *A*'s representatives. *A* promises to paint a picture for *B* by a certain day at a certain price. *A* dies before the day. The contract cannot be enforced either by *A*'s representatives or by *B*.

Damages upon a covenant for title can be recovered, in the event of the vendor's death, against his estate. This liability is confined to the legal representatives or heirs at law of the deceased. Covenant for title cannot be enforced as against each and every person in possession of the property of the deceased vendor.⁶

Performance and representatives of promisee.—Under Section 37, unless a contrary intention appears from the contract, a promise binds the representatives of the promisor in case the promisor dies without performing his promise. The Section does not expressly say anything regarding the liabilities of the representatives of the promisee. But as is obvious the promisee in a contract is often also a promisor *vis-a-vis* the other party, and as such the representatives of a promisee stand on the same footing as the representatives of a promisor.

Assignment of contracts.—See under Section 40, *post*.

Third party to contract.—See pages 216-232, *ante*. See *Beswick v. Beswick*, [1965] 3 All E.R. 858. See also under Section 41, *post*.

Law revision.—Whitley Stokes in his *Anglo-Indian Codes*, vol. I, 1887, page 571, observes that "Sections 38 and 39 seem out of place. Breach of contract is again taken up in Sections 51-55." It will be submitted, a statute in order to be brief and yet self-explanatory cannot afford to be split up on the pattern of the numerous subheads of a text-book of common law of

1. *Bapurao v. Anant Kashinath*, A.I.R. 1946 Nag. 210.

2. *Ramchandra v. Radha*, A.I.R. 1914 Nag. 19.

3. *Jairam v. Debidayal*, A.I.R. 1917 Nag. 116.

4. *Nanda v. Dhirendra*, (1913) 40 Cal. 710.

5. *Gajadhar v. Jagannath*, (F.B.) 46 All. 775; A.I.R. 1924 All. 551.

6. *Subbaram v. Chandrasekhara*, A.I.R. 1961 A.P. 29.

contract. It may be considered however whether the different sub-heads of the respective chapters of the Indian Contract Act could be re-written.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal to accept offer of performance.

Every such offer must fulfil the following conditions :

- (1) it must be unconditional ;
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do ;
- (3) if the offer is an offer to deliver anything to the promisee the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the first March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this Section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Non-acceptance of offer of performance.—Where a promisor has made an adequate offer of performance to the promisee and the said offer has not been accepted, the promisor will no longer be responsible for non-performance of the promise. He will neither lose his rights under the contract in spite of the factual non-performance of the promise made on his part.

According to the law of contract, the performance is said to be complete when there is a legal tender on the part of the promisee. It may sometimes happen that a person who is to perform a promise has been ready and willing to perform and has offered to perform his promise at the proper time and proper place. In such a case the contract is discharged. It is so discharged even in the case of a wrongful refusal to accept the performance. A valid tender satisfies all the requirements of the performance. No doubt if the tender consists in a promise to pay money, the promisor must go to the creditor the law being that the debtor must find out the creditor and offer the whole amount to him in such a way that the creditor might take the whole amount due to him even without the necessity for giving change as was the rule in the olden days. There must be either an actual offer

of the money by one party or a dispensation of such offer by the other. A mode of payment may also be determined by the previous conduct of the parties.¹

Where a mortgagee unequivocally refuses to receive payment if tendered on a due date the mortgagor is relieved from the duty of actually tendering the amount and the mortgagee cannot recover interest subsequently accruing.²

Where there had been a legal and proper tender and the other party did not accept it, the tenderer will be justified in selling the goods and suing the other party for damages.³

Adequate offer of performance.—Where there had been an adequate offer of performance on the part of the promisor but the said offer was not accepted by the promisee, the promisor will be excused for the non-performance of his promise, and at the same time he will retain his rights under the contract against the other party.

In order to be considered as adequate, an offer of performance must fulfil certain conditions. First, the offer must be unconditional. If the tender was accompanied by a condition which prevented it being a perfect and complete tender, the promisee was under no obligation to accept it. Such a conditional tender cannot be regarded as the equivalent of payment.⁴ A tender to be effective must be unconditional and of the full amount due. A tender clogged with the term that the money is to be taken as a settlement is not good.⁵

A valid tender must be an unconditional offer to pay a specific and ascertained sum. An offer to pay such amount as may be found due on a settlement of accounts if the payee would execute an indemnity bond in accordance with law is not a valid tender. There cannot be a tender or an agreement to waive tender of an unascertained sum.⁶

A tender under protest is not bad in law. The tender of more than what is due is good. A tender to be valid must be made in the current coins of the realm and a tender by cheque is not sufficient. But where a tender is actually made but in a medium different from that required by law, the objection to the form of the tender may be expressly or impliedly waived by the creditor and he will be deemed to have waived the objection, if he rejects the tender on other grounds, without making any objection to its legality in point of quality. Where plaintiff sent a single cheque for two items, only one of which was due at the time, and the other was not to be payable for some years to come, it was held that the cheque being one and indivisible

1. *Pyari Mohan v. Durga Sankar*, A.I.R. 1958 Orissa 125.

2. *Narain Das v. Rikhab Chand*, A.I.R. 1952 Raj. 72. *Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Patna 397.

3. *G. C. Simson v. Gora Chand*, (1883) 9 Cal. 473.

4. *Narain v. Abinash*, A.I.R. 1922 P.C. 347. *Juwana Mal v. Khushi Ram*, A.I.R. 1953 Punjab 70. *Hiralal v. Khizar Hayat Khan*, A.I.R. 1936 Lah. 168. *Narain Das v. Rikhab Chand*, A.I.R. 1952 Raj. 72.

5. *Bank of Mysore Ltd. v. Naidu*, A.I.R. 1954 Mysore 168.

6. *Lal Batcha Sahib v. Arcot Narainaswami*, (1911) 34 Mad. 320.

could be accepted as a whole or not at all and that the tender of one of the items by that cheque was not a good one and the promisee was within his rights in rejecting it.¹

The law of contract being mostly based on principles of equity, it cannot be laid down, as we have seen, as a general proposition that in order that it may be inadequate or legal tender actual money must be produced under all circumstances. There may be circumstances which will not require the promisor to *factually* offer performance of his own part in the bargain.²

Secondly, in order to constitute itself adequate the offer of performance must be made at a proper time and place and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.³ A contract to deliver to B at his warehouse on March 1, 1873, 100 bales of cotton of a particular quality. In order to make an adequate offer of performance, A must bring the cotton to B's warehouse on the appointed day under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for and that there are 100 bales.

Tender as such is valid and complete as soon as the party, who has entered into a contract to pay money to another, tenders the same to the party to whom the payment is to be made. Section 38 requires that the tender in order to be effective must be made in due time, at proper place and in a manner so as to make it, to the person who has to receive, easily ascertainable that the tender is real and sufficient. There is no room for importing into Section 38 anything like the requirement of depositing the amount in Court, along with the plea of tender put forthwith as a bar in an action for recovery. Any further tender or deposit in Court is a mere matter of form and the Court should not insist upon it.⁴

In construing Section 38 of the Indian Contract Act, rules of English law as to tender should not be relied upon. An offer made by a promisor through his solicitor, to pay a debt with interest due thereon at the date of the offer does not of itself afford a reasonable opportunity to the promisee of ascertaining that a promisor is able and willing there and then to perform his promise within the meaning of Section 38.⁵

Thirdly, if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered

1. *Hira Lal v. Khizar Hayat Khan*, A.I.R. 1936 Lah. 168.

2. *International Contractors Ltd. v. Prasanta*, A.I.R. 1962 S.C. 77; *Narain Das v. Rikhab Chand*, A.I.R. 1952 Raj. 72; *Juggernaut Sew Bux v. Ram Dyal*, (1883) 9 Cal. 791; *Venkataraman v. Subadrayamma*, A.I.R. 1923 P.C. 26; 46 Mad. 108; *Bhagavantulayya v. Venkandhora*, (F.B.) A.I.R. 1941 Mad. 484.

3. *Narain Das v. Rikhab Chand*, A.I.R. 1952 Raj. 72; *Joti Lal v. Futeh Bahadur*, A.I.R. 1929 Patna 397.

4. *Harnath Rai v. Hirdyanarain*, A.I.R. 1947 Patna 208.

5. *Ismail Bhai v. Adam Osman*, (1938) 2 Cal. 337; A.I.R. 1939 Cal. 131.

is the thing which the promisor was bound by his promise to deliver. A reasonable opportunity for inspection and examination is all that a purchaser is entitled to.¹

A tender of goods of the contract shipment, quality and description imported not by the plaintiffs but by another firm was a good tender.²

Where the buyer repudiated a contract on one ground, viz., that the goods were not tendered within the time agreed, he could not plead non-liability on another ground, viz., that the goods were not of the agreed quality.³ If a party is in a position to perform his part of the contract and expresses his readiness to perform it either personally or through his agent or representative that is sufficient evidence of readiness and willingness though the offer of performance may not amount to tender.⁴

Objection to the form of tender may be waived by the creditor either expressly or impliedly. If the creditor rejects the tender on other grounds he is deemed to have waived the objection as to the form of the tender. A creditor who denies the tender is not entitled to question its quality, sufficiency or validity.⁵ A debtor is required under the law to pay the creditor in current coins of the realm. A payment by cheque to the Rent Controller to the credit of the landlord is not payment in such current coins of the realm till the cheque is actually cashed into current coins and the cash is put into the landlord's account.⁶

Tender by cheque will be a valid tender if the person to whom it is tendered is willing to receive payment by a cheque. Where a party refuses to entertain the idea of payment from the tenderer at all and puts it out of his power to offer payment in a manner acceptable to the creditor the offer of performance by a person able to carry out the promise in its entirety is a valid tender in spite of the form of it being itself not legal tender.⁷

The lessee gave the agent of the landlord a cheque payable to the lessee's attorney for the amount demanded. The attorney realised the amount of the cheque and gave the money to the agent, who tendered it to the landlord's attorney, who refused to accept, and the money was returned to the lessee's attorney. Held, in a suit for the rent, that, under the circumstances, the tender amounted to payment.⁸

The payment of a debt by a cheque or a hundi does not result in the discharge of the debt except where there is an arrangement between a credi-

1. *Ruttonsey Morarji v. Jannadas Pitamberdas*, (1882) 6 Bom. 692; *Arunachalam v. Krishna*, A.I.R. 1925 Mad. 1168.

2. *Sazuki & Co. Ltd. v. Uttamchand Manokial*, (1926) 50 Bom. 318.

3. *Nannser v. Rayalu*, (1926) 49 Mad. 781. *Seemle*, the principle is not correctly stated.

4. *Sohanlal v. Bilasray*, A.I.R. 1954 Cal. 179.

5. *Krishnaswamy v. Mohanlal*, A.I.R. 1949 Mad. 535; *Bhagavantulyya v. Venkandhora*, (F.B.) A.I.R. 1941 Mad. 484; *Nannser v. Rayalu*, (1926) 49 Mad. 781, *Mozaffer v. Arraf*, A.I.R. 1914 Cal. 832.

6. *Brojendra v. Strish*, A.I.R. 1954 Cal. 459.

7. *Venkatarama v. Gopalakrishna*, A.I.R. 1929 Mad. 230.

8. *Boyle Chund v. Moulard*, (1879) 4 Cal. 572.

tor and a debtor that the receipt of a cheque or hundi by the creditor may result in an unconditional discharge of the debt and in the event of the cheque or the hundi not being honoured the creditor would have no right to sue on the original cause of the action but only on the cheque or the hundi.¹

A deposit in Court, before due date, of money due upon a bond is not a valid tender of the debt.² The rule that the tender of only a part of the debt must be treated as if it had never been made applies only where the party making the tender admits more to be due than is tendered. A plea of tender before action must be accompanied by a payment into court after action, otherwise the tender is ineffectual.³ One is only bound to accept the amount one is entitled to receive at the time of the tender.⁴ A tender may be of a greater sum of money, than the amount due. It is open, in such a case, to the creditor to accept so much of it as is due to him and reject the rest.⁵

One of the requisites of a valid tender is that the party making the tender must always be ready to fulfil the objection whenever called upon; or, as it is otherwise expressed, a tender in order to be valid must be kept good, in accordance with the requirements of the law. The plea of a legal and valid tender must not only allege that the person raising the plea is still ready but must be accompanied by payment into Court.⁶

However ready and willing to pay a party may have been there will not be a tender in law unless there is, following the offer outside the Court, unconditional deposit into Court of the money due.⁷ Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an *actual* tender of it.⁸

Where the vendor agrees to execute a conveyance, without specifically agreeing also to have the conveyance registered, the agreement will not be fully performed until the vendor has done all that he is required to do to have the document duly registered.⁹ Where registration is necessary, each party should do for the other all that is requisite towards such registration.¹⁰ The insistence by a party on the performance of a certain condition which does not form part of the terms of the contract and which was not in the

1. *Keshav Mills Co. Ltd. v. Commissioner of Income-Tax*, A.I.R. 1950 Bom. 166.

2. *Eshahug Molla v. Abdul Bari*, (1904) 31 Cal. 183.

3. *Abdul Rahman v. Noor Mohammed*, (1892) 16 Bom. 141.

4. *Watson & Co. v. Dhondra*, (1878) 3 Cal. 6, 16; *Chunder Cauri v. Jadonath*, (1878) 3 Cal. 468.

5. *Krishnaswamy v. Mohanlal*, A.I.R. 1949 Mad. 535.

6. *Rakhal Chandra v. Baikuntha*, A.I.R. 1928 Cal. 874; *Pandurang v. Dadabhoy*; (1902) 26 Bom. 643.

7. *Vaidyanatha v. Meenakshi*, A.I.R. 1957 Trav-Co. 216.

8. *Juggernauth Sew Bux v. Raw Dyal*, (1883) 9 Cal. 791.

9. *Hutchi Gowder v. Bheema Gowder*, A.I.R. 1960 Mad. 33.

10. *Kiam-ud-Din v. Rajjo*, (1889) 11 All. 13.

contemplation of parties or the subject-matter of agreement between the parties but was unilaterally super-imposed is tantamount to a refusal on the part of the said party to perform his part of the contract.¹ When an option, allowed for the performance of an executory contract and embodied in an agreement of sale, is exercised by one party to the agreement and assented to by the other it becomes irrevocable.²

An offer which would have been ineffective if made to the original promisee is no less ineffective if made to the legal representatives or heirs of the deceased promisee after the death of the latter.³ A tender of performance which is not in accordance with the terms of the contract can be withdrawn, and does not preclude the promisor from subsequently making a tender of performance in a proper manner, at any rate where the first tender has been rejected by the promisee.⁴

Offer of performance to one of several joint promisees.—As it has been seen before, where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance. In addition, such a promisor retains his rights under the contract in spite of his not having *factually* done his part of the bargain. The same principle applies to the case where an offer of performance was made to one or more of the several joint promisees and the said offer was not accepted. The promisor in order to exculpate himself from the obligation need not repeat his offer of performance to the rest of the several joint promisees. An offer to one of the several joint promisees is tantamount in law to an offer to each of them.

If the unaccepted offer of performance made in favour of any one of the joint promisees results in the discharge of the promisor, there is no reason why the acceptance of such offer should not release the promisor from the charge of non-performance of the contract where any alleged by other co-joint promisees. It has therefore been rightly held by a full bench of the High Court at Madras⁵ that one of the several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees.

A payment to one of the promisees under a promissory note will have the effect of discharging the debtor from his liability under the promissory note, notwithstanding that one of the other co-promisees had died. One promisee does not stand in the relationship of agent to his co-promisee, and on the death of the latter, his authority to grant a full discharge does not cease.⁶ In order that one of several joint promisees could give a valid discharge of a debt so as to bind all the promisees, the promisor must make,

1. *Rama Sastry v. Dakshina Murthy*, A.I.R. 1960 Andhra 178.

2. *Kumaraswami v. Karuppuswami*, A.I.R. 1953 Mad. 380.

3. *Ismail Bhai v. Adam Osman*, (1938) 2 Cal. 337: A.I.R. 1939 Cal. 131.

4. *Borrowman v. Free* (1878), 4 Q.B.D. 500 C.A.; *Tatley v. Shand* (1871), 25 L.T. 658.

5. *Annapurnamma v. Akkayya*, (F.B.) (1913) 36 Mad. 544.

6. *Ammalammal v. Gnanammal*, A.I.R. 1954 Mad. 473.

however, an actual payment to him of the debt, a mere undertaking to pay him the amount at some future date cannot deprive the other promisees of their right to sue for the debt.¹

Where it is proved that the payment of rent by the tenants has been made to one of the co-owners it is neither just nor equitable that the tenants should be asked to pay over again to the other co-owner. It is not necessary for the tenants to show that the payment was one made *bona fide*. It is, however, open to the other co-owner to bring a suit for the recovery of his share from the co-owner who has received the rent.² For further cases see under Section 45, *post*.

Apart from these cases which square with the statutory explanatory provision as given in Section 38, there have been a number of decisions which are at variance with the cases cited above.

The decisions which are at variance with the above cited cases either emphasise the point (a) that the acceptance of an offer of performance by one of the joint promisees when such an offer was made with the intent to defraud other joint promisees will not discharge the obligation of the promisor *vis-a-vis* other promisees; or (b) that the discharge of the promisor results only from the non-acceptance of the tender of performance as made to any one of the joint promisees and not from the acceptance thereof; or (c) that the provision of release resulting from the tender of performance to only one of the joint promisees does not apply in case of decrees of courts of law but is confined to contractual obligations alone. It may be submitted, as has been done before, that neither of the said (a) and (b) reasonings appears tenable. If non-acceptance of an offer of performance made in favour of only one of the several joint promisees results in the total release of the promisor why not its acceptance? Anyway, that is a fit case for a conclusive determination by the Supreme Court of the land. Pending such determination, the various schools of thought can be cited with reference to the respective decisions and briefly commented upon case by case.

In *Joti Bhushan v. B. N. Sarkar*, A.I.R. 1945 All. 311, it has been observed that a payment made to one of several co-creditors cannot operate as a valid discharge in respect of the debtor's liability to the other co-creditors if it is not *bona fide* and is either collusive or fraudulent. Where the payment by the lessee of the whole amount due under the lease to one of the co-lessors, namely, A, was not *bona fide* but collusive it had only the effect of discharging the lessee's liability to the co-lessor A to whom the payment was made and could not operate as a discharge of the lessee's liability to the other co-lessor B. B was in the circumstances entitled to bring a separate suit for the realisation of his share without making the co-lessor A a party. As against this decision it may be observed that the Privy Council decision of *Baraboni Coal Concern, Ltd. v. Gokulananda*, A.I.R. 1934 P.C. 58, on which it was based might show the other way. There in the *Baraboni Coal Concern* case their

1. *Ramasami v. Kotayya*, (1925) 48 Mad. 693.

2. *Hiralal v. Agarchand*, A.I.R. 1957 M.P. 5; *Parbhu Ram v. Raghubir*, (1917) 42 I.C. 408.

lordships have categorically held that where the lease discloses a joint demise or contract, no one of the several lessors, with or without the consent of his co-lessors, can sue for an aliquot part of the whole; the suit must be for the whole of the the interest demised, else it fails. Secondly, the question of *bona fides* is irrelevant in face of the implied import of the categorcial provision for the release in favour of the promisor resulting from a mere offer of performance in favour of any one of the several joint promisees. The same observations may be repeated with reference to the decisions¹ which fall in line with *Joti Bhushan v. B. N. Sarkar*, A.I.R. 1945 All. 311.

A few leading cases are however cited below to illustrate the principle adopted in *Joti Bhushan v. B. N. Sarkar*, A.I.R. 1945 All. 311.

Payment to a partner in fraud of his co-partner is not a valid discharge.² Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all members or creditors if the payment is fraudulently made to one and not for the benefit of all. The manager of a joint family has, as such manager, the right to represent the family in suits. A suit by him as such manager on behalf of the joint-family will be maintainable without making the other members parties to the suit.³ For further cases see under Section 45, *post*.

The sum due upon a mortgage was paid to one of the two mortgagees and he gave an acquittance without the knowledge of the other mortgagee who now brought his suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf: *Held*, that the mortgage had been discharged and the plaintiff was not entitled to sue.⁴

In *Annapurnamma v. Akkayya*, (1913) 36 Mad. 544, the question raised in the order of reference before the Full Bench was: "Whether one of the three payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other two payees?" The learned referring judges by the way pointed out that no valid reason had been suggested before them for any distinction between the claim under a mortgage bond and a negotiable instrument. The Full Bench consisted of only three judges, namely, Sir Charles Arnold White, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sadasiva Ayyar. As noted before, it was held by the Full Bench (the Chief Justice dissenting) that one of several payees of a negotiable instrument could give a valid discharge of the entire debt without the concurrence of the other payees. Chief Justice Sir Charles Arnold White, while dissenting from the majority view, adhered to the view

1. *Murlidhar v. Ishri Prasad*, (1884) 6 All. 576; *Chinnaramanuja v. Padmanabha*, (1896) 19 Mad. 471; *Barber Maran v. Ramana Goundan* (1897) 20 Mad. 461; *Manzur Ali v. Mahmud-un-Nissa* (1903) 25 All. 155; *Ram Chandra v. Goswami* (1910) 32 All. 164; *Kishen Prasad v. Har Narain* (1911) 15 C.W.N. 321; *Sheik Ibrahim Tharagan v. Rama Aiyar*, (1912) 35 Mad. 685.

2. *Chinnaramanuja v. Padmanabha*; *Sorimuthu v. Padmanabha*, (1896) 19 Mad. 471.

3. *Sheik Ibrahim Tharagan v. Rama Aiyar*, (1912) 35 Mad. 685, 687.

4. *Barber Maran v. Ramana Goundan*, (1897) 20 Mad. 461.

expressed in *Ramasami v. Muniyandi*, (1910) 20 M.L.J. 709. According to the learned Chief Justice, "Section 38 of the Contract Act provides that, where the promisor has made an offer of performance and the offer has been refused, the promisor is not responsible for non-performance. The last paragraph of the Section provides that an offer to one of several joint-promisees has the same legal consequences as an offer to all of them. It provides in effect that all the joint-promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them. The Section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted...." It is submitted that the view of the learned Chief Justice does not appear to be tenable for the following reasons amongst others :

First, the last paragraph of Section 38 is general and is not restricted to an offer which has not been accepted. Secondly, as has been asserted before, if an offer of performance releases the promisor, why not performance itself? Thirdly, the scheme of the Contract Act shows that the majority view of the Full Bench decision of *Annapurnamma v. Akkayya*, (1913) 36 Mad. 544, is in consonance with the so-called intention of the Legislature. Under Section 43, *post*, in the absence of express agreement to the contrary, when two or more persons make a joint promise, the promisee may compel any one or more of such joint promisor to perform the whole of the promise. In the absence of a contrary intention appearing from the contract, the fulfilling promisor or promisors may compel the other joint promisor, or promisors to contribute equally with himself or themselves. On a parity of reasoning it may be submitted that if under Section 38 a promisor satisfies only one of the several joint promisees over and above such promisee's due, the co-joint promisees may maintain an action for money had and received. Under Section 44, again, a release of one of the joint promisors by the promisee does not discharge the other joint promisor or promisors. The performing joint promisors are entitled to realise contribution from the released promisor. On a parity of reasoning it may be submitted that under Section 38 the non-satisfied joint promisees may recover from the satisfied promisee.

The view taken by Sir Charles Arnold White, Chief Justice would tend to make the law unduly rigorous to the prejudice of the debtor or promisor. Under Section 165, again, if several joint owners of goods bail them, the bailee may deliver them back to or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary. The fact that under Section 45 of the Contract Act the joint promisees and their representatives are all bound to jointly sue to recover the entire debt or to compel the entire performance is not material in interpreting the intendment of the explanatory provision of Section 38 which says that "An offer to one of several joint promisees has the same legal consequences as an offer to all of them", and under the first clause of the Section "Where

a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance. . . ." In the words of Sankaran Nair, J., "It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it".

The *rationale* given above in favour of the majority view in *Annapurnamma v. Akkayya*, (1913) 36 Mad. 544, notwithstanding, the few cases supporting the dissenting view of the learned Chief Justice Sir Charles Arnold White are given below.

In *Mahadeosingh v. Balmukund*, A.I.R. 1948 Nagpur 279, it has been observed that Section 38 deals with consequences which flow from an offer of performance which has been refused and does not deal with the legal consequences of the offer which has been accepted. Section 38 is thus not relevant for the determination of the question as to whether payment to one of joint creditors is binding on the other creditors.

Section 38 of the Contract Act is no authority for the proposition that a payment to one of several co-promisees operates as a valid discharge or is tantamount to payment to all of them. So a payment of rent to one of several co-sharer landlords does not give a valid discharge to a tenant.¹

M and *S* were joint lessors of certain land by a *kabulyat* which did not contain any specification of the shares of the lessors. *M*, stating that the share of rent due to *S* had already been paid, sued the lessee for the recovery of his own share. The amount claimed was all that remained due on the lease. The plaintiff was entitled, as one of the joint lessors, to sue for the balance of the rent.² One of two mortgagees who have advanced the mortgage-money equally cannot give a good discharge for the entire mortgagee debt without the consent of or reference to his co-mortgagee.³ Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor.⁴

A payment by the debtor to one of several joint creditors does not operate as a payment to them all.⁵ Payment made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed, will not discharge the promisor from his liability under the bond.⁶ The contention that payment to any member of the family was by itself necessarily binding on the other member who took the contract could not be supported.⁷

1. *Shyamlal v. Jagannath*, A.I.R. 1937 All. 527.
2. *Murlidhar v. Ishri Prasad*, (1884) 6 All. 576.
3. *Ram Chandra v. Goswami*, (1910) 32 All. 164.
4. *Sitaram v. Shridhar*, (1903) 27 Bom. 292.
5. *Joti Bhushan v. B. N. Sarkar*, A.I.R. 1945 All. 311.
6. *Ankalamma v. Chenchayya*, (1918) 41 Mad. 637.
7. *Adaikkalam v. Marimuthu*, (1899) 22 Mad. 326.

In the case of co-obligees of a money, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares.¹

Coming to the realm of judgments and decrees of the courts of law it may be submitted that once the Court has been in seisin of the matter the provisions of the law of contract may not apply in terms. If the intention of the parties to the contrary can in most cases prevail over the statutory provisions of the law, there is no reason why the decrees of the court of law should not be treated on a separated level from what are pure contractual obligations. A few cases are cited below.

In *Mahomed Silar Sahib & Co. v. Nabi Khan Sahib*, A.I.R. 1917 Mad. 988, it was observed that payment to one or more joint decreeholders would bind the rest if they were constituted as agents of the latter, but the status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree, and cannot merely be inferred from the position of the payee as managing member of the joint Hindu family of the decree-holders or as one of several partners decree-holders. The rights of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree has no bearing on the decision of the question whether, when the partners have become decree-holders, two of them can receive the joint decree-debt. A payment of the amount of a decree to two out of three joint decree-holders cannot be treated as a satisfaction of the decree even in part, unless it is admitted by the third decree-holder or unless it is proved that he and the other two decree-holders to whom the money was paid, own separate and definite shares in the joint decree-debt.

A decree standing in the name of a firm is a decree in favour of all the partners jointly even for the purposes of Order XXI, Rule 15, of the Code of Civil Procedure. One of several joint decree-holders though they are partners cannot, by reason of the provisions of Rules 1 and 15 of the Order XXI of the Code, give a valid discharge by receiving the decree amount out of Court without the concurrence of the other decree-holders. A suit was filed in the name of a firm, consisting of the brothers of a joint Hindu family, represented by its managing partner and the decree therein was obtained in the name of the firm represented by the managing partner. Subsequent to the decree another brother of the family and a partner of the firm received a sum in full satisfaction of the decree and put in a memorandum requesting the Court to record satisfaction. *Held*, that the payment to that brother alone was not a valid discharge of the decree debt so as to bind the other partners of the firm.²

Law revision.—See under Section 37, *ante*.

1. *Manzur Ali v. Mahmud-un-Nissa*, (1903) 25 All. 155.

2. *Muthusamy v. Narasimha*, (1934) 57 Mad. 696.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance.

Effect of refusal to perform promise wholly.

Illustrations

(a) *A*, a singer enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of 100 rupees for each night. On the sixth night *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

Refusal on the part of the promisor to perform his promise in its entirety.—When a party to a contract has refused to perform his promise in its entirety, the promisee may put an end to the contract or he may signify by words or conduct his acquiescence in the continuance of the contract in the question.¹ *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract. But if in spite of her wilful absence on the sixth night she, with the assent of the manager, sings on the seventh night, then the manager acquiesces in the continuance of the contract and he cannot now put an end to it. He is only entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

A refusal before due date by seller to perform his part of the contract does not disentitle him from demanding performance from the buyer within a reasonable time if no action is taken by the other party on such refusal.² Where the plaintiffs failed to make the second shipment by a steamer of which they might have availed themselves, the defendant was held justified in rescinding the contract.³

The mortgagor mortgaged the property for a fixed period of 15 years in consideration of the mortgagee paying a decree-holder, who had a charge on the mortgaged property, certain instalments regularly. There was a covenant that in the event of the decree-holder proceeding to bring the property to sale and selling it the mortgagee would be entitled to recall the whole of the mortgage-money due to him. After paying some of the instalments, the

1. *Md. Husain v. Andani Co.*, A.I.R. 1959 M.P. 30; *Sooltan Chund v. Schiller*, (1879) 4 Cal. 252; *Union of India v. Bungo Steel Furniture (Pt.) Ltd.*, A.I.R. 1963 Cal. 70; *Everest Cine Corporation v. Khuku*, A.I.R. 1965 Cal. 446.

2. *Phul Chand v. Jugal Kishore*, A.I.R. 1927 Lah. 693.

3. *Volkart Brothers v. Rutnavelu*, (1895) 18 Mad. 63.

mortgagee made default and the mortgagor, after satisfying the decree-holder, sued to redeem the mortgage. *Held*, that it was open to the mortgagor to ignore the condition of 15 years and as the mortgagee failed to perform his part of the contract, it followed that the mortgagor was also entitled to rescind his promise as well and as the recover possession of the mortgaged property under the provisions of Sections 39 and 54 of the Contract Act, and Section 24 (b) of Specific Relief Act, 1877, without waiting for the expiry of 15 years.¹ Now see Section 16 (b) of the Specific Relief Act, 1963. A party to a contract who commits a breach of the contract cannot require the other party to perform his part of it.²

Cases of refusal or repudiation.—To constitute repudiation it must be shown that the party to the contract made quite plain his intention not to perform the contract.³

If one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance or even before that time, the other party may accept or may decline that offer. If he accepts, then by consensus the contract is determined and then the party offering to repudiate cannot turn round and insist on its performance by the other or sue for damages for non-performance.⁴

When there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract. The disclaimer or renunciation is not complete until it is communicated, and as it takes place at the place where disclaimer or renunciation is delivered, the Court at the place where such communication of renunciation of the contract is complete has got jurisdiction to try the suit for damages for breach of contract.⁵ In *Car and Universal Finance Co. Ltd. v. Caldwell*, [1964] 3 All E.R. 600 C.A., because of fraud on the part of the purchaser, immediate steps were taken to regain the goods. But purchaser's whereabouts were unknown. No communication of the intention of repudiation on the part of the seller could be effectuated. It was however held that the act of avoidance was sufficient.

If a contract is validly cancelled by a party the motive behind the action even if bad would not convert it into an illegal act and furnish a cause of action to the other party under the contract to sue for damages or compensation for breach of contract. The motive is irrelevant.⁶

G, a legatee, executed an agreement in favour of the testator agreeing to pay certain monthly amount as *guzara* to the testator from the date the testator would execute a will in favour of G. The testator executed a will in

1. *Sanwaley Prashad v. Sheo Sarup*, A.I.R. 1927 Oudh 12.
2. *District Board, Jhelum v. Hari Chand*, A.I.R. 1934 Lah. 474.
3. *Master v. Garret & Taylor, Ltd.*, A.I.R. 1931 Rang. 126.
4. *Jhandoo Mal v. Phul Chand*, A.I.R. 1925 Lah. 217.
5. *Dhanraj Mills v. Narsingh*, A.I.R. 1949 Patna 270.
6. *T. C. Rattayya v. Venkataramayya*, A.I.R. 1959 Andhra 551.

favour of *G*; but *G* did not pay the amount stipulated. The testator did not terminate the contract by revoking the will and died. As the testator did not terminate the contract by taking the obvious course of revoking the will it was not open to his legal representatives to revoke the will when the testator died without exercising that right.¹

Where a contract is repudiated, it survives for the purpose of measuring claims arising out of the breach and the arbitration clause contained in it survives for determining the mode of settlement of the claims. The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of settling all questions to which his repudiation has given rise. It cannot be said that the arbitration clause will be given effect to only if the contract comes to an end by virtue of some clause in the agreement but not when the contract is ended by something *dehors* the agreement.²

When in a contract for the sale of goods, the buyer clearly shows his intention not to be bound by and to repudiate the contract, it amounts to a breach of the contract. In such a case the seller may treat the notice of intention as inoperative, in which case he keeps the contract alive for the benefit of the buyer as well as his own; or he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action on a breach of it.³ Where the vendor refused to give vacant possession of the land sold, the purchaser could rescind the contract and recover the money advanced.⁴

Repudiation by vendee which absolves the seller from the performance of conditions precedent must be made before the due date for the performance of the contract. This date in the case of a *c. i. f.* contract is the date on which the documents ought to have been tendered. A buyer who rejects goods on a wrong ground is not thereby precluded from relying on a valid ground which in fact exists.⁵

In a *c. i. f.* contract, the purchaser is bound to accept the documents which represent the goods and honour the draft. He is not entitled to raise at that stage any question as to whether the goods are in accordance with the contract or not. Any refusal on the part of the purchaser of the documents amounts to a breach of the contract and makes him liable for damages. If after taking delivery of the goods it is found that they are not in accordance with the contract, the purchaser has a right to reject the goods and to pursue his remedies against the seller.⁶

Where as per terms of the contract of affreightment a demand for space is made by the shipper, the fact that the shipper had no goods to ship and

1. *Raj Rani v. Dwarka Nath*, A.I.R. 1946 Oudh 193.
2. *Radhukishin v. General Construction Co.*, A.I.R. 1947 Sind 57.
3. *Steel Brothers & Co. Ltd. v. Dayal Khatao*, (1923) 47 Bom. 924: A.I.R. 1924 Bom. 247.
4. *Anandulal v. Abdul Husain*, A.I. R. 1974 Raj. 240.
5. *Steel Bros. & Co., Ltd. v. Dayal Khatao & Co.*, 47 Bom. 924: A.I.R. 1924 Bom. 247.
6. *Gulamali and Co. v. Mohamed Yousuf*, A.I.R. 1954 Madras 268.

was attempting to obtain an advantage due to the rise in freight does not entitle the shipowner to refuse to consider the demand and repudiate the contract though the aforesaid fact can be taken into account when considering the question of damages.¹

Where a widow enters into a compromise with the sole person entitled to the estate, whereby she obtains a life estate in the property on condition that she would not exercise the right of adoption conferred by her husband, she cannot take any advantage under the compromise if subsequently she adopts in pursuance of the authority of her husband.²

The defendant agreed to sell the suit land to the plaintiff so that the plaintiff might construct a building on it and the plaintiff paid Rs. 500 as advance towards the purchase price. The defendant did not disclose to the plaintiff that the land was an agricultural one and that the permission from the Revenue authorities of the Gwalior Government accorded to the defendant for using his land for building a house on it was non-transferable. The nature of the land was considered in the instant circumstances as a material object in the seller's title to the property which the buyer could not with ordinary care discover. The non-disclosure of the defect in title was considered as a material misrepresentation tainting the contract and consequently justifying the purchaser to rescind it and to have back his deposit.³

A contract of insurance like any other contract is completed by an offer made by one party to the other and accepted by the latter; prepayment of the premium is not in law a condition precedent to the contract of insurance. Such payment may by a necessary stipulation be made a condition precedent; and that condition, again, even when made, may be waived by the insurer.⁴ So long as the agency subsists, the principal remains under his contractual obligation to pay the commission in terms of the agreement which creates mutual rights and obligations of a continuing nature, in spite of all the shortcomings of the agent in the discharge of his duties under the agreement.⁵

A wrongful repudiation by one part cannot, except by the election of the other party so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called "brutum fulmen", that is the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent.⁶

In *White & Carter (Councils) Ltd. v. McGregor*, [1962] 2 W.L.R. 17 H.L.,

1. *Herman & Mohatta v. Asiatic Steam Navigation Co. Ltd.*, A.I.R. 1941 Sind 146.

2. *Bishunatk v. Sheo Bahadur*, A.I.R. 1927 Oudh 265.

3. *Jhamaklal v. Mishrilal*, A.I.R. 1957 M.B. 23.

4. *Ocean Accident and Guarantee Corporation Co. Ltd., v. Patkar*, A.I.R. 1935 Bom. 236; *Abdul Azeez & Co. v. New India Assce. Co., Ltd.*, A.I.R. 1954 Mad. 520.

5. *Boulton Bros. & Co. Ltd., v. New Victoria Mills Co. Ltd.*, A.I.R. 1929 All. 87.

6. *Florrie Edridge v. Rustomji Danjibhai*, A.I.R. 1933 P.C. 233.

the appellants, advertising contractors, agreed with the representative of the respondent, a garage proprietor, to display advertisements for his garage for three years. On the same day the respondent wrote requiring them to cancel the contract on the ground that his representative had mistaken his wishes, but they refused, and five months after the date of contract began the display in accordance with it. The contract provided: "In the event of an instalment...being due for payment, and remaining unpaid for a period of four weeks, or in the event of the advertiser being in any way in breach of this contract then the whole amount due for the 156 weeks or such part of the said 156 weeks as the advertiser shall not yet have paid shall immediately become due and payable". The respondent having refused to pay any sum due under the contract, the appellants sued him for the whole amount. The appellants were entitled to carry out the contract and claim the full contract price, and were not obliged to accept the repudiation and sue for damages.¹ It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. If a party has no interest to enforce a stipulation, he cannot in general enforce it: so it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.² Equity will not rewrite an improvident contract where there is no disability on either side.³ There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to himself by the contract.

Where the attempt at repudiation fails, the original contract continues.⁴ Reliance on *bona fide* but mistaken construction is not repudiation.⁵

Disablement to perform a contract in its entirety.—When a party to a contract has disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance. Where a party is disabled from performing his part of the contract, the other party has a right to rescind.⁶ When the vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the purchaser will be entitled, by virtue of Section 55 (1) (f) of the Transfer of Property Act and Section 39 of the Contract Act, to rescind the contract and claim the advance that has been paid to him.⁷

1. Lords Morton and Keith dissented.

2. *Per* Lord Reid.

3. *Per* Lord Hodson.

4. *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254.

5. *Sweet & Maxwell Ltd. v. Universal News Services, Ltd.*, [1964] 3 W.L.R. 356 C.A.

6. *Soolian Chund v. Schiller*, (1879) 4 Cal. 252; *Mohammad Husain v. Andani Co.*, A.I.R. 1959 M.P. 30.

7. *Vuddandam v. Venkatakeswara*, A.I.R. 1951 Mad. 470.

The plaintiff under a contract was to take delivery of goods on a certain date. He filed an application for insolvency before that date. The interim receiver who was appointed in the insolvency proceedings also did not act immediately or even within a reasonable time to adopt the contract of the plaintiff. The insolvency of the plaintiff was equivalent to a notice by the insolvent that he did not intend to perform his obligation. The conduct of the plaintiff and the interim receiver entitled the defendants to treat the contract as abandoned by the plaintiff. Inordinate delay in such cases may well be taken to be evidence of the abandonment of the contract, dispensing with express rescission by notice or agreement.¹

Total refusal of performance.—It is needless to say that where a party to a contract refuses altogether to perform, or is disabled from performing his part of it, the other party has a right to rescind.² As it has been observed in *Harihara v. Mathew*, A.I.R. 1965 Ker. 187, a breach of a contract is not its rescission but gives a right to the injured party to put an end to the contract at his choice.

Dr. P. was a servant of the District Board of Patna. His service was terminated for his long continuous absence without leave and without any justification. The Board was entitled to terminate his service. As the termination was not by way of punishment for misconduct, principles of natural justice did not apply.³

Executory contracts.—Section 39 applies to cases of what are called “executory” contracts and not to “executed” contracts. Where the transaction had been completed, consideration having passed from the vendee to the vendor and the vendor having executed and registered the deed of assignment, the non-delivery of the deed by the vendor to the vendee is not such an act as would render the contract null and void at the choice of the vendee. Section 39 does not apply to such a case.⁴ Section 39 applies only to a state of things where there is a series of executory promises on both sides, and so soon as one part of the obligation has been performed by a complete transfer of the property in question, that Section ceases to have any application.

Where a lessee having agreed in the lease-deed to discharge a debt of the lessor secured on the demised lands, failed to pay the debt, and the lesser being sued by the mortgagee executed a usufructuary mortgage to other persons and with the mortgage to other persons and with the proceeds thereof paid off the debt, and thereupon the lessee sued to recover possession of the demised lands from the lessor and the usufructuary mortgagees who pleaded that the former was not entitled to recover possession under his

1. *Pulgaon Cotton Mills Ltd. v. Gulabai*, A.I.R. 1953 Nag. 345; see also *Rama Raju v. Official Receiver, Guntur*, A.I.R. 1964 Andhra 299.

2. *Sooltan Chund v. Schiller*, (1879) 4 Cal. 252; *Union of India v. Bungo Steel Furniture (Pt.) Ltd.*, A.I.R. 1963 Cal. 70.

3. *Parmanand v. District Board*, A.I.R. 1962 Panta 452.

4. *Sultan Ahmad v. Maksad Hussain*, A.I.R. 1944 Patna 3.

lease on account of his default in not discharging the debt as agreed to in the lease-deed, *held*, that the lessee was entitled to recover possession of the lands under his lease, though he had not paid the debt as agreed to in the lease-deed. A lease is an executed contract; it is a transfer of property or of an interest in property and all the considerations which apply to the enforcement of mere contracts do not necessarily apply to a transfer; consequently the doctrine regarding mutual promises contained in Section 39 of the Contract Act has no application to a lease. Section 35 of the Specific Relief Act, 1877, did not apply to the case, as the plea did not relate to any facts which vitiated the contract culminating in the lease but to something which happened after the grant of the lease, namely, non-payment of the debt mentioned in the lease-deed.¹

Section 39 applies only to an executory contract, that is, only when there is something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. When a contract has been broken and the parties subsequent to the breach came to an agreement in respect of the same subject-matter it is in law a new contract. There is a difference between a refusal to perform a contract before its performance has become due and a failure to perform it after it has become due.² Section 39 presupposes that the contract is subsisting, and there is something to be performed under it. It applies to cases of what are called "executory" contracts and not "executed" contracts. The option given by this Section to the promisee to keep the contract alive clearly implies that this Section can have application only when there is still something to be performed under the contract.³

Substituted agreements.—Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to under Section 39 on account of such breaches, the original contract is not thereby revived.⁴

Where under the original contract one party has advanced some money to the other and the contract is subsequently varied by consent of parties the latter must, in the absence of any agreement to that effect, return the sum to the former, call it money had and received or money held by one to the use of the other or money due on failure of consideration. To such a case Section 39 or Section 64 is not applicable.⁵

Consequences of breach.—As to the consequences of breach of contract see Sections 73-75, *post*. A few cases considered relevant under Section 39 are given below. In case of breach, either damages or liquidated demands

1. *Kandasami v. Ramasami*, (1919) 42 Mad. 203 : A.I.R. 1919 Mad. 168.

2. *Kumaraswami v. Karuppuswami*, A.I.R. 1953 Mad. 380.

3. *Kedarnath v. Sheonaran*, A.I.R. 1957 Patna 408.

4. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642.

5. *Ranajit v. Bezoni Bajorji*, A.I.R. 1950 Cal. 226.

may be realized.¹

A mortgaged certain land to *B* for Rs. 800. Under the terms of the mortgage-deed *B* was to pay Rs. 500, of the advance to *C* in discharge of a previous mortgage executed by *A* in favour of *C*. Of the balance of Rs. 300, *B* was to retain Rs. 200 in payment of a previous debt of *A* due to him, and the balance of Rs. 100 was to be paid to *A*. *B* paid the said Rs. 100, retained the Rs. 200, but neglected to pay the said Rs. 500 to *C*, who sued *A* and recovered the debt by attachment and sale of *A*'s movable property. After eight years from the date of the mortgage *B* brought a suit to recover the interest due under the mortgage on Rs. 300 only. *Held*, that under Section 39 of the Contract Act, *A* was entitled to cancel the contract of mortgage owing to *B*'s conduct, but that he was bound to give up the benefit he had received, viz, Rs. 300 and pay interest thereon up to the date of cancellation. *B* was not entitled to treat the original mortgage as a mortgage in force with all its stipulations for Rs. 300 instead of Rs. 800, and on that view to sue for interest alone.² A liability to make restitution attaches to the party putting an end to the contract under Section 39 and if a payment has been made under a contract which has, for whatever reason, become void, the duty of restitution would seem to emerge. A cross-claim for damages, however, stands upon an independent footing, though it arises under the same contract and can be set off.³ Where the defendants had not performed a most essential part of the contract of mortgage, the plaintiffs were allowed to redeem before the expiration of the stipulated period of mortgage.⁴

Anticipatory breach.—Where a party to a contract commits an anticipatory breach, the injured party has an option of rescinding it or of electing to treat it as continuing and then suing on the due date for such damages as then accrue. An election once made cannot be avoided.⁵ Anticipatory breach takes effect as a premature destruction of the contract rather than a failure to perform in its terms.⁶ See vol. 2, Section 73.

Under Section 60 of the Sale of Goods Act, 1930, where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as subsisting and wait *till* the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. A repudiation of the betrothal is an anticipatory breach of the contract of marriage. The plaintiff, who had been betrothed to the defendant's daughter, sued for a declaration that unless the defendant was willing that the marriage should be performed before the expiration of the month of Vaishakh of the then current year, the contract for the marriage should no longer be binding on the plaintiff and that the betrothal was void, and for

1. *P. R. & Co. v. Bhagwandas*, (1910) 34 Bom. 192.

2. *Subba Rau v. Devu Shetti*, (1895) 8 Mad. 126.

3. *Harischandra v. Murlidhar*, A.I.R. 1957 M.B. 53.

4. *Chhotku Rai v. Baldeo Shukul*, (1912) 33 All 659.

5. *Inamali v. Priyawati*, A.I.R. 1937 Nag. 289.

6. *Manindra Chandra v. Aswini Kumar*, (1920) 48 Cal. 427.

damages for breach of the contract of betrothal and marriage. The instant contract of marriage was made by the father of the bride. There having been no implied condition that fulfilment of the contract would depend on the willingness of the girl at the time of the marriage, the plaintiff was held entitled to the declaration prayed for and also for damages.¹ Where a broker instructed to purchase a certain quantity of merchandise as broker for the purchaser, the transaction being open till a particular date, and the purchaser repudiates the transaction before that date, it is open to the broker either to refuse to accept the repudiation and wait till the due date keeping the transaction open and sue for damages on the basis of the price of the merchandise on due date, or accept the repudiation, close the account at the current rate on the date of repudiation and recover damages on that basis. In a pure case of damages, the Court cannot give interest before judgment.²

On August 29, 1951, a written contract was made between *A* and *B* whereby *B* agreed to purchase freehold property from *A*. The date fixed for completion was November 30, 1951, and the *National Conditions of Sale* (15th ed. 1948) were incorporated in the contract. *B* paid a deposit of ten per cent of the purchase price. On November 21, 1951, *B* committed an act of bankruptcy. On December 3, 1951, *A* purported, by letter to *B*, to repudiate their contract and to forfeit the deposit. On December 5, 1951, *B* was adjudicated bankrupt. In an action by *B*'s trustee in bankruptcy against *A* for damages for breach of the contract it was held that *A* was not entitled to treat the act of bankruptcy as an anticipatory breach entitling him immediately to repudiate the contract, or, after the passing of the date for completion, to treat the contract as though time were of its essence, entitling him to rescind the contract for *B*'s failure to complete on the due date, and, therefore, *B* was in breach of the contract and liable in damages.³

In *Sudan Import & Export Co. (Khartoum) v. Societe Generale de Compensation*, [1958] 1 Lloyd's Rep. 310, the sellers agreed to sell to the buyers 2,000 metric tons (10 per cent more or less at the sellers' option) of Sudanese groundnuts, the buyers to supply a ship in September, 1955. The contract provided that the measure of damages in case of default was to be limited to the difference between the contract price and the market price on day of default. On August 29, 1955, the buyers cabled that they could not take over the goods, stating that a letter followed. This letter was received by the sellers on September 7 and contained a repudiation. The sellers cabled on September 10 refusing to accept the repudiation but accepted it on September 20. The Court of Appeal, affirming the decision of Ashworth J., [1957] 2 Lloyd's Rep. 528, held that the date for assessing damage for non-performance by the buyers was the date when their repudiation was accepted by the sellers and not when it was first made. There having been evidence that the sellers had in fact allocated 2,000 tons to the contract, the "10 per

1. *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*, (1897) 21 Bom. 23, 35.

2. *Ratanlal v. Brijmohan*, A.I.R. 1931 Bom. 386.

3. *Jennings' Trustee v. King*, [1952] 2 All E.R. 608 C.D.

cent more or less at the sellers' option" clause was ignored. In *Mainindra Chandra v. Aswini Kumar*, (1920) 48 Cal. 427, it was observed that on the defendants' repudiation of a contract, the plaintiff was entitled to sue at once, but his damages were to be assessed according to the cost of performance not at the time and place of the breach, but at the time and place set for performance. This decision as to the point of time on the basis whereof damages should be based seems to have been opposed by later decisions as noted before.

Breach of warranty.—Law sometimes seeks to make a distinction between obligation and obligation. Some obligations are considered as vital and others only subsidiary. Where the vital obligations have been performed, the contract is taken to be substantially performed, entitling the performer to sue on the contract notwithstanding the fact that he has not performed the subsidiary obligations. The English Sale of Goods Act, 1893, Section 11 (1) (c), lays down that even the breach of a condition may not always discharge the contract. In its effect sometimes a condition is given the place of a warranty thus entitling the party substantially performing the contract to sue on it. The breach of a condition when treated as a breach of a warranty entitles the other party only to damages and not to discharge. As a rule, a party may refuse to perform his promise till the other party has complied with a condition. This rule is subject to some exceptions. Thus, when the party has received and accepted a substantial part of the consideration promised in his favour, the condition changes its character and becomes a warranty which affords no defence to an action but only gives the right to a counter-claim for damages. So also when a party has received a part of the consideration for which he bargained even though he did not receive the whole. The law in such cases requires him to perform his part of the agreement while allowing him to sustain an action for damages against the party which is guilty of imperfect or incomplete performance of the condition.

Under Section 12 (1) of the (Indian) Sale of Goods Act, 1930, a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or warranty. Under Section 12 (2), a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. Under Section 12 (3), a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. Under Section 12 (4), whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract. As to when a condition is to be treated as a warranty under the (Indian) Sale of Goods Act, 1930, see Section 13, *ibid.* As to the remedy for breach of warranty under the (Indian) Sale of Goods Act, 1930, see Section 59, *ibid.* See also vol. 2, under Section 73.

In *East India Commercial Co. Ltd. v. Collector of Customs*, A.I.R. 1962 S.C. 1893, the licence was issued subject to condition not to sell the goods that were imported. Goods were received and delivery thereof taken paying customs duty. Subsequently breach of the condition was detected. Notice was issued to the licence-holder to show cause against confiscation of the goods. Writ application was competent as the breach of the condition in the licence was not a breach of the order under Section 3 of the Imports and Exports (Control) Act, 1947. The issue of the notice was without jurisdiction. See also pages 199-207, *ante*.

By whom Contracts must be Performed

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Person by whom promise is to be performed.

Illustrations

(a) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and if, *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

Where promisor himself was intended to perform.—If it appears from the nature of a given contract that it was the intention of the parties that a promise contained in it should be performed by the promisor himself it must be so done. Where *A* promises to paint a picture for *B*, the promise must be performed by *A* himself. Where from the nature of the case it does not appear that the promisor himself was intended to perform the promise, the promisor may himself perform it or he may not. Instead, he or his representatives may employ a competent person to perform the promise. Thus, where *A* promises to pay *B* a sum of money, he may perform the promise either by personally paying the money to *B* or by causing it to be paid to *B* by another. Whether *A* is living or dead, his representatives may themselves perform the promise or employ some proper person or persons to do it. Where performance of a contract is required to be done in person and the personal qualifications of the promisor are the consideration for the contract, the death or disablement of the promisor discharges the contract and frees the other party from liability.¹

Generally speaking, the benefits of a contract are assignable, subject of course to the rule of a contrary intention. The onus is on the person who pleads against assignability and he has to discharge it by proving the contrary intention. This contrary intention may be express or it may arise

1. *Gopalaswamy Temple v. Manikyan*, A.I.R. 1957 Andhra 643. See also *Everest Cine Corporation v. Khuku*, A.I.R. 1965 Cal. 446.

by necessary implication, and one recognized illustration of this latter class is to be found in what are usually known as personal contracts or contracts depending upon the learning, skill, solvency, or any personal qualification of the assignor or the party to the contract, from whom the benefits of the contract are claimed under the particular assignment.¹ See *Hemraj Keshavji v. Haridas Jethabhai*, A.I.R. 1964 S. C. 1526, and the cases considered therein.

A defendant with special skill when employed for reward by the plaintiff was bound to exercise his skill in the execution of the duties entrusted to him and ought not to rely on the statement of others.² Where the personal quality of the party, with whom a contract is made, is a material ingredient in the contract, the right to enforce specific performance ceases upon the death of the person with whom the contract is made, and cannot be claimed by his legal representative.³ This is so even when the said party is the promisee.

It has to be determined in each case whether the obligation which it is sought to enforce depended upon the personal conduct of the deceased party. If in any particular case the contract is one which has relation to the personal conduct of the contracting party, than the death of that party puts an end to the contract; if, on the other hand, it has no such relation, the death of the contracting party was not to that effect.⁴ A dewan of a zamindari may perform some of the functions of an agent on behalf the of zamindar. The relationship between him and the zamindar is however essentially that of master and servant or employer and employee. The general principles regulating contracts of employment between master and servant will apply in the case of the dewan and zamindar and not the principles dealing with the contract between principal and agent. It is the implied condition of an agreement for personal service that the death of either party will dissolve it.⁵

Where promisor himself was not intended to perform.—Where the personal skill, reputation, or the personality of the promisor was not a material factor in the promisee's expectation of the performance of the promise, it can be performed either by the promisor himself or his representatives or by other competent person or persons on his or their behalf.

The assignment of contractual liabilities.—As a rule, the burden of a contract cannot be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all

1. *Ali Mistri v. Kayem Ali*, A.I.R. 1955 Cal 621.

2. *Sitarampur Coal Co., Ltd. v. Colley*, (1908-9) 13 C.W.N. 59.

3. *Mohendra Nath v. Kali Proshad* (1903) 30 Cal 265.

4. *Jagannath v. Pitambar*, A.I.R. 1954 Orissa 241; *Phillips v. Alhambra Palace Co.*, [1901]

1 K.B. 59; *Graves v. Cohen*, (1929) 46 T.L.R. 121.

5. *Jagannath v. Pitambar*, A.I.R. 1954 Orissa 241.

three, and involves the release of the original debtor.¹ It is only by way of novation that an obligation can be fastened on a third party. Here, again, the consent of the creditor is indispensable. Novation also requires some consideration in order to be binding on the defendant. Without consideration a novation will be void and ineffective.² The implied or express acceptance by a creditor of the liability of a third person in lieu of that of the original debtor makes the novation binding against the defendant, that is, the new debtor. Similarly, the acceptance by a creditor of the sole and separate liability of one of two or more joint debtors is a good consideration for an agreement to discharge all the other debtors from liability.³ Apart from a novation the debtor cannot shift his personal liability to a third person.⁴ Even if he seeks to shift it, on the basis of some consideration, the original creditor will not be bound by his contract with a third person. He can however engage a third person to discharge for and on his behalf his obligation to the original creditor. Personal discharge of the obligation is not always insisted on. On the other hand, apart from the case of contract made on the basis of personal skill, competency, judgment, taste, reputation, or personality, vicarious performance of the obligation is deemed in law to be as good a discharge of the liability as the personal one. Unless, however, the performance has been in complete satisfaction of the terms of the contract, the original contractor is not discharged.⁵ The person making the vicarious performance may be bound to the original contractor but not to the original contractee. In practice, much work is contracted for which is generally executed by means of sub-contracts. For all practical purposes it is immaterial to the original contractee whether it is done by the immediate party to his contract or by someone else on his behalf.⁶ As noted before, the possibility of the discharge of an obligation by vicarious performance depends upon the particular nature of the contract. Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor, must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances.⁷ The rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of

1. *Tolhurst v. Associated Portland Cement Manufacturers*, (1900), [1902] 2 K.B. 660, 668; *Khardah Co. Ltd. v. Raymon and Co.*, A.I.R. 1962 S.C. 1810.

2. *Tatlock v. Harris*, (1789) 3 F.R. 174, 180; *Liversidge v. Broadbent* (1859), 4 H. and N. 603.

3. *Lyth v. Ault and Wood*, (1852) 7 Exch. 669; *Hart v. Alexander* (1837), 2 M. and W. 484; *Bilborough v. Holmes* (1876), Ch. D. 255.

4. *Khardah Co. Ltd. v. Raymon and Co.*, A.I.R. 1962 S.C. 1810.

5. *Schmaling v. Thomlinson* (1815), Taunt, 147.

6. *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149, 154; *Tolhurst v. Associated Portland Cement Manufacturers*, (1900), [1903] A.C. 414, 417.

7. *Davies v. Collins*, [1945] 1 All E.R. 247, 250; *British Waggon Co. v. Sea* (1880), 5 Q.B.D. 149, 153; *Robson and Sharpe v. Drummond* (1831), 2 B. & Ad. 303; *Boulton v. Jones*, (1857) 2 H. & N. 564; *Edwards v. Newland and Co., Burchett (E.) Ltd., Third Party*, [1950] 2 K.B. 534; [1950] 1 All E.R. 1072.

assignment either under the law or under an agreement between the parties.¹ An arbitration clause does not take away the right of a party to contract to assign it if it is otherwise assignable.² An arbitration clause is not a personal covenant in the sense that it cannot be assigned.³ In equity, there can be a valid transfer of property which can be acquired afterwards.⁴

Negotiability distinguished from assignability.—Usage of trade has made some instruments transferable by delivery. Nothing more than their delivery is required to transfer the rights which they respectively contain to the transferees. The property in such instruments is acquired by one who takes them *bona fide* and for value. Where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument. The person who, by genuine indorsement, or where it is payable to bearer, by a delivery, becomes a holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.⁵ This right of action in his own name on a negotiable instrument in the holder for the time being and a title both to the document containing the contract, and to all rights under the contract, irrespective of defect in title of the person from whom the holder acquired it are the results of trade usage, or effects of statutory provisions. These rights of the holder of the given instruments, that is, the incidents of negotiability attaching to the said instruments are the creatures of the law or mercantile usage rather than the creation of the parties.⁶ The law of the negotiable instruments is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience; the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into the law of the land, both in England and in India, and elsewhere, and may thus be said to form part of it.⁷ By the very nature of the incidents

1. *Khardah Co. Ltd. v. Raymon and Co.*, A.I.R. 1962 S.C. 1810.

2. *Khardah Co. Ltd. v. Raymon and Co.*, A.I.R. 1962 S.C. 1810; *Lotus Oil Co. v. Calcutta Soap Works*, A.I.R. 1962 Cal 441.

3. *Shayler v. Woolf*, [1946] 2 All E.R. 54 C.A. (*per* Morton and Somervell, L.JJ.).

4. *Mohini Mohan v. Mohanlal*, A.I.R. 1964 Cal. 470.

5. *Crouch v. Credit Foncier of England*, (1873) L.R. 8 Q.B. 374, 381.

6. *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 658, 671.

7. *Goodwin v. Roberts* (1875), L.R. 10 Exch. 337, 346.

of the negotiable instruments, usage and trade customs remain to be operative, though both in England and in India statutes have been passed laying down broad provisions of law governing negotiable instruments. The list of negotiable instruments that may be accepted as such by the Court is thus not closed.¹ By trade usage and custom as well as by statutory provisions negotiable instruments have incidents sometimes different from those of other instruments. When a negotiable instrument has been transferred, the transferee in order to safeguard his interests need not notify to the debtor the fact of endorsement. The transferee of a negotiable instrument does not take subject to equities.² As regards consideration, the law is that in order to bind the debtor some consideration must have been given in the history of the instrument.

It is not necessary that the person realizing the money must prove that he himself had given the value for the instrument. Thus, where value has at any time been given for a bill the holder is deemed to be holder for value as regards the acceptor and all parties to the bill who become parties prior to such time, that is, prior to the time at which value was given.³ In the case of a negotiable instrument, the presumption in law is that consideration has been given for it. It is for the defendant to prove that no consideration had at all been supplied in the history of the instrument.⁴ It is also presumed in law that the holder had taken the instrument in good faith and without notice of any illegality or defect in the title of the party who had negotiated it to him. When, however, it has once been shown that a given instrument was vitiated by illegality in the course of its life, the holder seeking to enforce the payment will have to establish that so far as he was concerned, he took it in good faith.

Involuntary assignment of contractual rights and liabilities.—The executors of a deceased contractor may complete his obligation and recover the price; they may also be sued by the contractee for their non-performance of the obligation of the deceased contractor.⁵ The contract between principal and agent or master and servant being based on personal considerations the death of either of the parties does not confer or impose a like right or obligation on the executors of a deceased party to the contract of agency or of master and servant.⁶ Where, again, a person becomes a bankrupt, his contracts affecting property are enforceable by his trustee in bankruptcy. Similarly, the bankrupt person's right of action will vest in his

1. *Edlastein v. Schuler*, [1902] 2 K.B. 144, 154.

2. *Miller v. Race*, (1758) 1 Burr. 452.

3. S 27(2) of the English Bills of Exchange Act; Section 198(a) of the Negotiable Instruments Act, 1881.

4. *Mills v. Barber*, (1836) 1 M. & W. 425.

5. *Marshall v. Broadhurst*, (1831) 1 Cr. & J. 403; *Wentworth v. Cock* (1839), 10 Ad. & El. 42; *Cooper v. Jarman* (1866), L.R. 3 Eq. 98; *Ahmed Angullia Bin Hadjes Mohamed Salleh Angullia v. Estate and Trust Agencies* (1927), Ltd., [1938] A.C. 624; [1938] 3 All E.R. 106.

6. *Farrow v. Wilson* (1869), L.R. 4 C.P. 744.

trustee where the damages are to be estimated by immediate reference to his rights of property. Where, on the other hand, the damages are to be estimated by immediate reference to the pain felt by the bankrupt in respect to his body, mind, or character, and without immediate reference to his rights of property, the right of action does not pass to his trustee in bankruptcy.¹ Even in the case of a breach of contract the right of action will vest in the trustee in case the breach occurs before the commencement of bankruptcy.² Where the breach has occurred after the commencement of bankruptcy, the right of action remains with the bankrupt. Here again the trustee in bankruptcy may intervene and realize from the sum recovered the amount which is in excess of what was required for the maintenance of the bankrupt and his family.³

Cases of assignment.—An assignment in law is an act by which one person transfers to another or causes to vest in another his right or title to something before the object of the transfer has become property in possession of the assignor. It is the transfer or setting over the right to fruits of cause of action from one person to another. It does not differ in its essential elements from any other contract and must therefore comply with the fundamental requisites which are applicable to contracts generally.

A valid and enforceable contract of assignment comes into being when it is executed by parties possessing legal capacity to contract, when it is supported by consideration, when it is not contrary to law or to public policy, when it is not tainted with fraud or illegality and when it is not the result of an agreement between the assignor and the assignee that they shall divide the property sued for between them in consideration of the assignee carrying on the suit in his own name and possibly also at his own expense. A person who wishes to obtain a decree on the basis of a deed of assignment must allege and prove a valid assignment in order to show that he had a cause of action. Where an assignment is champertous and not supported by any consideration it is void, that is unenforceable.⁴

When considerations connected with the person whom a contract is made form a material element on the contract, it may well be that such a contract on that ground alone is one which cannot be assigned without the promisor's consent so as to entitle the assignee to sue him on it.⁵ Where a contract is based on a personal consideration, an assignment of it as an executory contract is invalid without the consent of the promisee.⁶ The right to claim the benefit of a contract for the purchase of goods is a "beneficial interest in

1. *Beckham v. Drake* (1849), 2 H.L. Cas. 579, 627; *Jenning's Trustee v. King*, [1952] Ch. 899; [1952] 2 All E.R. 608; *Rose v. Buckett*, [1901] 2 K.B. 449; *Wilson v. United Counties Bank*, [1920] A.C. 103.

2. *Drake v. Beckham*, [1843] 11 M. & W. 315.

3. *Bailey v. Thruston*, [1903] 1 K.B. 137.

4. *Prem Singh v. Sat Ram*, A.I.R. 1958 Punjab 52.

5. *Toomey v. Rama Sahi*, (1890) 17 Cal. 115.

6. *Namaswaya Gurukkal v. Kadir Ammal*, (1894) 17 Mad. 168.

moveable property" within the definition of "actionable claim" in Section 3 of the Transfer of Property Act, 1882, and, as such, assignable.¹

In contracts, except where they depend on personal factors of the contracting parties or the like, assignability is the rule and the contrary is the exception. The contrary intention, therefore, has to be clearly established either from express words or from necessary implication.² By a sale deed *A*, on behalf of himself and as guardian of his minor son *B*, who with *A* formed a joint Hindu family, sold a village of the family to one *C*. By a counterpart document it was provided that *C* should reconvey the said village after a period of thirty years upon the repayment of the consideration. The benefit of the contract of reconveyance was assignable.³ Contractual pre-emption right is not necessarily personal.⁴ A contract to sell goods is assignable by a seller, and a contract to buy goods is assignable by a buyer.⁵ A contract to sell goods can be assigned by the seller so as to enable the assignor to sue for damages for breach of contract on tender of performance by him. Such a contract is one which must have been contemplated by the parties as capable of being performed on both sides by their assigns or representatives. Assignment of such contract is not a transfer of a mere right to sue for damages; it is a transfer of the rights under a contract which is still to be performed on both sides.⁶ A contract by *pucca adatia* may be made assignable by necessary provisions.⁷ The assured can transfer his rights to a third person, including an insurer.⁸

Transfer of property.—The Transfer of Property Act, 1882, as amended from time to time, defines and amends certain parts of the law relating to the transfer of property by act of parties. The Act is not exhaustive of the law of transfer of property. It defines only certain parts of the law relating to the transfer of property by act of parties. Transfer of property by operation of law such as sale in execution, forfeiture, insolvency, or intestate succession is not covered by the Act of 1882. Save as provided by Section 57 and Chapter IV of the Act, a transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction is not affected by the Act. The Act is limited in its scope to transfers *inter vivos*. Testamentary succession is excluded.⁹

"Transfer of property", according to the Transfer of Property Act, 1882, means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and

1. *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.*, (1906) 33 Cal. 702: (on appeal) (1907) 34 Cal. 289.

2. *Ram Baran v. Ram Mohit*, A.I.R. 1961 Cal. 152.

3. *Sakalaguna v. Munuswami*, A.I.R. 1928 P.C. 174.

4. *Ram Baran v. Ram Mohit*, A.I.R. 1961 Cal. 152.

5. *Hanumanthiah v. Thinmaiah*, A.I.R. 1954 Mad. 87.

6. *Rangiah v. Parthasarathy*, A.I.R. 1947 Mad. 258.

7. *Jethmal v. Nevatia and Co.*, A.I.R. 1962 Andhra 350.

8. *Vasudeva v. Calendonian Insurance Co.*, A.I.R. 1965 Mad. 159.

9. Section 2(d), *ibid*.

one or more other living persons ; and "to transfer property" is to perform such act.¹

Except as otherwise provided by the Transfer of Property Act, 1882, or by any other law, property of any kind may be transferred. The Transfer of Property Act, 1882, Section 6, lays down that several things cannot be transferred. The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.² A mere right of re-entry for a breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby. An easement cannot be transferred apart from the dominant heritage. An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred. A mere right to sue cannot be transferred. A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred. No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee. A tenant having an untransferable right of occupancy, or a farmer of an estate in respect of which default has been made in paying revenue, or a lessee of an estate under the management of a Court of Wards, cannot assign his interest as such tenant, farmer, or lessee.

Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.³

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.⁴

A transfer of property may be made without writing in every case in which a writing is not expressly required by law.⁵ In certain cases of transfer, the Transfer of Property Act, 1882, requires some formalities to be observed. The sale of a tangible immoveable property of the value of one hundred rupees and upwards, or of a reversion or other intangible thing

1. Section 5, *ibid.*

2. *Abdool Hoosein v. Goolam Hoosein*, (1906) 30 Bom. 304 ; *Jagannada v. Prasad Rao*, (1916) 39 Mad. 554.

3. Section 7, *ibid.*

4. Section 8, *ibid.*

5. Section 9, *ibid.*

can be made only by a registered instrument.¹ Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.² A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee. The State Government may however from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.³

None of the provisions of Chapter V of the Transfer of Property Act, 1882, apply to leases for agricultural purposes, except in so far as the State Government may, by notification published in Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force. Such notification shall not take effect until the expiry of six months from the date of its publication.⁴ A transfer of property in completion of an exchange (for which *see* Section 118) can be made only in manner provided for the transfer of such property by sale.⁵ For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.⁶ The statutory requirements for a valid transfer under the Transfer of Property Act, 1882, are however subject to the doctrine of part performance. Section 53-A of the Act lays down:

“Where any person contracts to transfer consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,
then, notwithstanding that the contract, though required to be registered.

1. Section 54, *ibid.*

2. Section 59, *ibid.*

3. Section 107, *ibid.*

4. Section 117, *ibid.*

5. Section 118, *ibid.*

6. Section 123, *ibid.*

has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The State Financial Corporations Act, 1951,¹ lays down some restrictions on transfer of certain shares of the Finance Corporations as established under Section 3 of the Act.² A mere *spes successionis* is not recognized by Mahomedan Law.³ A chose in action, if it was a debt due to the insolvent in his trade or business, came within the words "goods and chattles" as contained in Section 23 of the Indian Insolvent Debtors's Act.⁴ A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of Section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of Section 6(e) of the same Act and therefore cannot be transferred.⁵ A mere right to recover damages for the negligence of an agent in failing to collect rents cannot be transferred. Such a right is nothing more than a right to sue within the meaning of Section 6(e) of the Transfer of Property Act, 1882.⁶

Transfer of actionable claims.—Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts, recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent.⁷

Section 130 of the Transfer of Property Act, 1882, lays down :

"(1) The transfer of an actionable claim whether with or without consideration shall be affected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

1. Act 63 of 1951.

2. Section 5, *ibid*.

3. *Abdool Hoosein v. Goolam Hoosein*, (1906) 30 Bom. 304.

4. *Puninthavelu v. Bhashyam*, (1902) 25 Mad. 406.

5. *Abu Mahomed v. S. C. Chunder*, (1909) 36 Cal. 345.

6. *Varhaswami v. Ramchandra*, (1915) 38 Mad. 138, 140.

7. Section 3 of Transfer of Property Act, 1882.

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this Section applies to the transfer of a marine or fire policy of insurance or affects the provisions of Section 38 of the Insurance Act, 1938 (4 of 1938).

Illustrations

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who not having received notice of the transfer as prescribed in Section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A*'s executor, subject to the proviso in sub-section (I) of Section 130 and to the provisions of Section 132."

For an effective transfer of an actionable claim a duly signed notice is necessary. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee, or his agent, and shall state the name and address of the transferee.¹ A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.²

The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer. *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer. *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.³

Save as otherwise provided in or under the Indian Securities Act, 1920, no notice of any trust in respect of any Government security shall be receivable by the Government.⁴ This provision as to Government securities

1. Section 131 of the Transfer of Property Act, 1882.

2. For explanation, see Section 3 of the Transfer of Property Act, 1882.

3. Section 132 of the Transfer of Property Act, 1882.

4. Section 3, *ibid*.

is, again, subject to the provisions of the Public Debt Act, 1944.¹ Section 6 of the Public Debt Act, 1944, also lays down that no notice of any trust in respect of any Government security shall be receivable by the Government nor shall the Government be bound by any such notice even though expressly given, nor shall the Government be regarded as a trustee in respect of any Government security.

Assignment or transfer of insurance policies.—The Insurance Act, 1938, Section 38, lays down :

“38. (1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but, except where the transfer or assignment is in favour of the insurer, shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment and either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorized agents have been delivered to the insurer.

* * * * *

(5) Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of the receipt of the notice recognize the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

* * * * *

(7) An assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life time of the person whose life is insured, and an assignment in favour of the survivor or survivors of a number of persons shall be valid”.

Section 39 of the Insurance Act, 1938, further, lays down :

“39. (1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death :

1. Section 29, *ibid.*

Provided that, where any nominee is a minor, it shall be lawful for the policy-holder to appoint in the prescribed manner any person to receive the money secured by the policy in the event of his death during the minority of the nominee.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

* * * * *

(4) A transfer or assignment of a policy made in accordance with Section 38 shall automatically cancel a nomination :

Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy."

The provisions of Sections 38 and 39 relating to assignment, transfer and nomination in the case of life insurance policies shall apply to policies of insurance issued by any provident society covering any of the contingencies specified in clause (a) of sub-section (2) of Section 65 of the Act.¹

Assignment of rights under policy of insurance against fire.—Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.²

Transfer of policy of marine insurance.—Section 130A of the Transfer of Property Act, 1882, laid down :

"130A. (1) A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.

(2) A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.

(3) Where the insured person has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing,

1. Section 94 of the Insurance Act, 1938 (Act 4 of 1938).

2. Section 135 of the Transfer of Property Act, 1882.

expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative :

Provided that nothing in this sub-section affects the assignment of a policy after loss."

As regards assignment of rights under policy of marine insurance, Section 135A of the Transfer of Property Act, 1882, lays down :

"135A. (1) Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name ; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(2) Where the insurer pays for a total loss, either of the whole, or in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject-matter as from the time of the casualty causing the loss.

(3) Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss."

The Marine Insurance Act, 1963, has repealed with effect from 1 August, 1963 Sections 130-A and 135 of the Transfer of Property Act, 1882, as well as sub-sections (1), (2) and (3) of Section 7 of the Indian Stamp Act, 1899. Nothing in clause (e) of Section 6 of the Transfer of Property Act, 1882, shall either affect the provisions of Sections 17, 52, 53, and 79 of the Marine Insurance Act, 1963. See also Section 91, *ibid.* As to *subrogation* see pages 612-614, *ante*.

Indian securities.—Transfer of Government securities will not be valid unless it satisfies the provisions of the Public Debt Act, 1944.¹ Notwithstanding anything in Section 15 of the Negotiable Instruments Act, 1881, no indorsement of a Government promissory note shall be valid unless made by the signature of the holder inscribed on the back of the security itself.² Notwithstanding also anything in the Negotiable Instruments Act, 1881, a person shall not by reason only of his having indorsed a Government security, be liable to pay any money due, either as principal or as interest, thereunder.³

Transfer of Property Act, 1882, and negotiable instruments.—The provisions of Chapter VIII of the Transfer of Property Act, 1882, do not apply

¹ S. 4.

2. Section 5 of the Indian Securities Act, 1920.

3. Section 8 of the Indian Securities Act, 1920.

to stocks, shares, or debentures, or to instruments which are for the time being by law or custom, negotiable or to any mercantile document of title to goods. The expression, "mercantile document of title to goods", includes a bill of lading, dock-warrant, warehousekeeper's certificate, railway-receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.¹

Under the Indian Bills of Lading Act, 1856, every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.²

Chose in action in England.—'Chose', a French word, pronounced 'shoz' means a thing.³ 'Chose in action' means 'thing in action'.⁴ The expression 'choses in suspense' is also used as synonymous with 'choses in action.' Chose in action otherwise called chose in suspense is a thing of which a man has not the possession or actual enjoyment, but has a right to demand by action or other proceeding, as a debt, bond, etc. All personal things are either in possession or in action. The law knows no *tertium quid* between the two. Property in chattels personal, says, Blackstone, may be either in possession, which is when a man hath not only the right to enjoy, but hath the actual enjoyment of the thing; or else it is in action, where a man hath only a bare right without any occupation or enjoyment. 'Chose in action' is thus the antithesis of 'chose in possession', and the two choses are thus an equivalent to all kinds of personal property. The two conditions of chose in action and chose in possession are antithetical; there is no middle term.⁵

Property rights such as bills of lading, copyrights, debts, legacies, negotiable instruments, patents, policies of insurance, rights of action arising out of tort or breach of contract, rights under a trust, shares, are known in law as choses in action. 'Chose in action' is a legal expression used to describe all personal rights of property, which can only be claimed or enforced by action, and not by taking physical possession.⁶

Under the English common law, no possibility, right, title, or thing in action could be assigned to a third party, for it was thought that a different

1. Section 137 of the Transfer of Property Act, 1882.

2. Section 1, *ibid*.

3. Wharton : *Law Lexicon*, 14th ed., 1953, 190.

4. Stroud : *Judicial Dictionary*, 3rd ed., 1952, vol. 1, 478.

5. *Allegemeine v. German Property Administration*, [1931] 1 K. B. 672.

6. *Torkington v. Magee*, [1902] 2 K. B. 427, 430.

rule would be the occasion of multiplying litigation.¹ In equity, however, the rule under the common law was entirely disregarded, and from a very early period choses in action of all kinds were held to be freely assignable for valuable consideration.

A legal chose in action, in English legal terminology, is a right which can be enforced by an action at law as opposed to equity. The debt due under a contract is a common example. An equitable chose in action is a right which was enforceable in England, before the Judicature Act, 1873, only by a suit in equity. Some rights, a legacy or an interest in a trust fund, for example, were enforceable before the Judicature Act, 1873, only in Chancery.

Choses in action may be real, personal, and mixed. The expression 'legal choses in action' includes choses in equity within its scope.² An assignment by way of mortgage of an interest under a will of which due notice has been given to the trustees was thus a legal chose in action.

The property in deeds in the hands of a third person is a chose in action. Shares in a company are things in action. Property in the funds, a life policy, and a debenture in a company are choses in action; so also is a hire-purchase agreement. An undivided share in a partnership is a chose in action. So is a patent right; a life interest in personal chattels; a reversionary interest in the proceeds of land and held in trust for sale but not yet sold. Things in action includes claims by the liquidator against directors for malpractices in reference to the property of a company.³ A claim to damages for tort, e.g., an infringement of a patent, is a chose in action.⁴ An assignment of "all moneys now or hereafter standing to the credit of" A at his banking account, is an assignment of a "debt or other legal chose in action".⁵ So of a sum payable so many days after demand.⁶ A contract, e.g., for the sale of a reversion, which has been assigned before breach, is a "legal chose in action" the assignment of which enables the assignee to recover, in his own name, damages for its subsequent breach.⁷

A chose in action implies the existence of some person entitled to rights which are rights in action as distinct from rights in possession. A share in a company regulated by the Companies Act is not a chose in action until it is issued and a person entitled to such right exists.⁸ Legal chose in action does not include an agreement to lend money, or a right to damages for breach of contract or for a tort.⁹

The English Judicature Act, 1873, Section 25 (6), later, from a functional point of view, replaced by Section 136 of the English Law of Property Act,

1. See Hanbury, *Modern Equity*, 8th ed., 1962, 73, and note 75.

2. *Re Pain*, [1919] 1 Ch. 38.

3. *Re Park Gate Waggon Co.*, 17 Ch. D. 234.

4. *Colonial Bank v. Whinney*, 30 Ch. 261.

5. *Walker v. Bradford Bank*, 12 Q. B. D. 511.

6. *Mercantile Bank of London v. Evans*, 43 S. J. 97.

7. *Torkington v. Magee*, [1902] 2 K. B. 427.

8. *Re V. G. M. Holdings*, [1942] Ch. 235.

9. *May v. Lane*, 64 L. J., Q. B. 236.

1925, allowed the assignee of a legal chose in action to sue in his own name, provided however (i) the assignment was absolute, and not by way of charge only; (ii) the assignment was in writing under the hand of the assignor; and (iii) express notice in writing was given to the debtor. Under the Judicature Act, 1873, the presence of consideration was not material for a valid assignment of a chose in action.¹ Assignment in equity has not been superseded by Section 25 (6) of the Judicature Act, 1873. See Hanbury, *Modern Equity*, 8th ed., 1962, 81-82. Assignment of an ascertained part of a debt does not satisfy the Judicature Act, 1873, but, is good in equity. In *W. F. Harrison & Co. Ltd. v. Burke & anr.*, [1956] 1 W. L. R. 419: [1956] 2 All E. R. 169 C. A., it has been held that the date of the assignment must not be wrongly stated in the notice of assignment in order to effectually assign the legal right to the debt, under Section 136 (1) of the Law of Property Act, 1925. Lord Justice Denning observed that a notice of assignment ought to have stated the amount of the debt correctly.

An assignment of a chose in action in England may be valid, in given circumstances, under the judge-made law as well as statutory provisions.

Under Section 1 of the English Policies of Assurance Act, 1867, a written notice to company is essential for the assignment of a policy of life insurance. The English Marine Insurance Act, 1906, Section 50 (2), makes a policy of marine insurance assignable. According to the English Law of Property Act, 1925, an assignment to be valid under the said Act has to be absolute and to be in writing; in addition, an express notice in writing must be given of the absolute assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action.

An absolute assignment is one by which the entire interest of the assignor in the chose in action is for the time being transferred unconditionally to the assignee and placed completely under his control.² If the entire interest of the assignor in the chose of action is for the time being transferred unconditionally to the assignee, it will be an absolute assignment even though the assignment is subject to a proviso for redemption and re-assignment upon the fulfilment of certain terms. An absolute assignment is distinguished from a conditional assignment,³ an assignment by way of charge⁴ as well as from an assignment of a part of a debt.⁵

An absolute assignment of an equitable chose in action entitles the assignee to bring an action in his own name against the debtor.⁶ The non-

1. *Re Westerton* [1919] 2 Ch. 104.

2. *Tancred v. Delagoa Bay and East Africa Rly. Co.* (1889), 23 Q. B. D. 239; *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190.

3. *Durham Brothers v. Robertson*, [1898] 1 Q. B. 765.

4. *Jones v. Humphreys*, [1902] 1 K. B. 10; *Burlingson v. Hall* (1884), 12 Q. B. D. 347, 350.

5. *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; *Williams v. Atlantic Assurance Co.*, [1933] 1 K. B. 81; *Waller and Sullivan, Ltd. v. J. Murphy & Sons, Ltd.* [1955] 2 Q.B. 585 [1955] 1 All E.R. 843.

6. *Cator v. Croydon Canal Co.*, (1841) 4 Y. & C. (Ex.), 593.

absolute assignment of an equitable chose in action does not entitle the assignee to sue in his own name, but requires him to join the assignor as a party. The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt.¹ The assignor, again, in the case of a non-absolute assignment of an equitable chose in action is not entitled to recover the amount remaining due from the debtor without joining the assignee as a party to the action.²

An assignment, whether absolute or not, of a legal chose in action does not entitle the assignee to sue in his own name, but requires him to join the assignor as a party to any action he may bring for the recovery of the right assigned.³ Only the statutory assignee of a legal chose may now sue in his own name.

Under Section 136 of the English Law of Property Act, 1925 :

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice :—

(a) the legal right to such debt or thing in action ; (b) all legal and other remedies for the same ; and (c) the power to give a good discharge for the same without the concurrence of the assignor".

An absolute assignment of equitable as well as legal choses in action when made by writing has been thus statutorily made effectual in law.⁴ This statutory provision as to the requirements of a valid assignment has not barred the equitable assignments that were and are still open in favour of the assignee. When an assignment has been valid under the statute, the assignee can bring an action in his own name. When the assignment has not been absolute, or when it has not been made in writing, or when the required written and express notice of the assignment has not been given, the assignee cannot avail himself of the statutory benefit of suing in his own name. He can seek to enforce the assignment by making the assignor either a co-plaintiff or a co-defendant to his action.⁵

1. *Re Steel Wing Co.*, [1921] 1 Ch. 349 : 357.

2. *Walter and Sullivan, Ltd. v. J. Murphy & Sons, Ltd.*, [1955] 2 Q.B. 584 : [1955] 1 All E.R. 843.

3. *Bowden's Patents Syndicate, Ltd. v. Herbert Smith & Co.*, [1904] 2 Ch. 86, 91.

4. *King v. Victoria Insurance Co. Ltd.*, [1896] A.C. 250, 254 ; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38, 44.

5. *Performing Right Society, Ltd. v. London Theatre of Varieties, Ltd.*, [1924] A.C. 1, 14, 20, 30 ; *Re Westerton. Public Trustee v. Gray*, [1919] 2 Ch. 104, 112 ; *Tolhurst v. Associated Portland Cement Manufacture* (1900), [1903] A.C. 414, 424 ; *Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454, 461 ; *Bowden's (E.M.) Patents Syndicate, Ltd. v. Smith (Herbert) & Co.*, [1904] 2 Ch. 86, 91.

As noted above, under the English Law of Property Act, 1925, written notice to the debtor or other person from whom the right assigned is due is necessary to complete the right of the statutory assignee. The statutory assignment becomes effective at the date on which it is received by or on behalf of the debtor or the other person from whom the right assigned was due.¹ In spite of these requirements for a statutory assignment, no particular form of words is required to constitute a valid equitable assignment. An assignment which does not satisfy the requirements of the Judicature Act, 1873, Section 25(6), or of the Law of Property Act, 1925, Section 136, may thus be a valid equitable assignment, but the assignor must be a party to any proceedings brought against the debtor. For an equitable, as opposed to statutory, assignment the notice is not compulsory.² This non-requirement of the notice though leaving the equitable assignment valid does not however render the giving of the necessary notice unnecessary. In order to bind the debtor or the other person as well as to gain priority, notice is indeed advisable or indispensable.³ In the case of an assignment of an equitable interest in land or in personalty, the English Law of Property Act, 1925, Section 137(3), requires the notice to be in writing. In other cases the notice may be oral as well as in writing. In all cases, however, the notice must be expressly clear.⁴

An assignee, whether statutory or not, is subject to the defences available as against the assignor. If a man takes an assignment of a chose in action he must take his chance as to the exact position in which the party giving it stands. An assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception. The rights of set-off and other defences in order to be available to the debtor, must be ones arising out of the contract which has created the subject-matter of the assignment. The assignee is thus not subject to any personal claims against the assignor.⁵

When an assignment has fulfilled the statutory requirements, it is a valid and effectual one, even if based on no consideration.⁶ No particular form of words is required to constitute a valid equitable assignment. Thus an

1. *Holt v. Heatherfield Trust, Ltd.*, [1942], 2 K.B. 1. 5 : [1942] 1 All E.R. 404, 407.

2. *Gorringe v. Irwell India Rubber Works*, (1886) 34 Ch. D. 128 ; *Re Trytel. Ex parte The Trustee of the property of the Bankrupt v. Performing Right Society, Ltd., and Soundtrac Film Co. Ltd.*, [1952] 2 T.L.R. 32.

3. *Stocks v. Dobson* (1853), 4 De G.M. & G. 11 ; *Dearle v. Hall* (1828), 3 Russ. 1 ; *Mutual Life Assurance Society v. Langley* (1886), 35 Ch. D. 460.

4. *James Talcott, Ltd. v. John Lewis & Co. Ltd., and North American Dress Co. Ltd.*, [1940] 3 All E.R. 592, 596.

5. *Mangles v. Dixon* (1852), 3 H.L. Cas. 702, 735 ; *Roxburgh v. Cox* (1831), 17 Ch. D. 520 ; *Young v. Kitchen* (1878), 3 Ex. D. 127 ; *Stoddart v. Union Trust, Ltd.*, [1912] 1 K.B. 181.

6. *Re Westerton. Public Trustee v. Gray*, [1919] 2 Ch. 104, 112.

assignment which did not satisfy the requirements of the English Judicature Act, 1873, Section 25 (6) or of the English Law of Property Act, 1925, Section 136, might or may be a valid equitable assignment, but the assignor must be a party to any proceedings brought against the debtor.¹ An absolute assignment in England of a legal or equitable chose in action, though not in the form as prescribed under the English Law of Property Act, 1925, is effective even though not based on any consideration.² The non-absolute assignment of a legal or equitable chose in action, say, for example, in the case of a conditional assignment, or of an assignment by way of charge, is void unless it is based on consideration.³

An equitable assignment of a chose when completed will be valid even though not based on any consideration.⁴ An agreement to assign a chose in action is not however valid when without consideration and creates no obligation in favour of the assignee. Only when an agreement has been made under seal, consideration is not indispensable to make it valid and effectual. When an equitable assignment has not been completed, a consideration is thus essential in order to make it binding upon the assignor. So long as a transaction rests in expression of intention only, and something remains to be done by the donor to give complete effect to his intention, it remains uncompleted, and the Court will not enforce what the donor or assignor is under no obligation to fulfil. But when the transaction is completed, and the donor or assignor has created a trust in the object of his bounty, or transferred the ownership of the property, equity will interfere to enforce it.⁵ Before the completion, the law allows, in the absence of consideration, the assignor or donor to retract from the contemplated assignment.⁶

When an assignment relates to future property, but is based on no consideration, it will be as void as an agreement to assign without consideration. When an agreement to assign has the support of a consideration it will be binding on the subject-matter when it comes into existence.⁷

Contractual obligations cannot be assigned. In certain cases, however, the obligation to perform a contract may be delegated, but such delegation

1. *Durham Brothers v. Robertson*, [1898] 1 Q.B. 765.

2. *Harding v. Harding* (1886), 17 Q.B.D. 442; *Re Patrick. Bills v. Tatham*, [1891] 1 Ch. 82; *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408; *Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1; [1942] 1 All E.R. 404; *Re McArdle*, [1951] Ch. 669; [1951] 1 All E.R. 905.

3. *Re Fry. Chase National Executors and Trustees Corporation v. Fry*, [1946] Ch. 312; [1946] 2 All E.R. 106; *Jones v. Humphreys*, [1902] 2 K.B. 10.

4. *Kekewich v. Manning* (1851), 1 De G.M. & G. 176, 188; *Re McArdle*, [1951] Ch. 669, 674; [1951] 1 All E.R. 905, 908.

5. *Harding v. Harding* (1886), 17 Q.B.D. 442, 444.

6. *Ellison v. Ellison* (1802), 6 Ves. 656.

7. *Re Frytel. Ex parte The Trustees of the property of the Bankrupt v. Performing Right Society, Ltd. and Sountrac Film Co., Ltd.*, [1952] 2 T.L.R. 32; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, 546; *Glegg v. Bromley*, [1912] 3 K.B. 474, 489.

does not affect the rights and liabilities of the contracting parties. Whether delegation is possible or not depends upon the construction of the contract in the light of the surrounding circumstances.¹ A bare right of litigation is not assignable.² A right of action which is incidental and subsidiary to property may, however, be assigned along with the assignment of the property.³ A right to recover damages for a tort committed in respect of a property but before its assignment is not assignable.⁴ Where contracts have been made on the basis of personal skill, efficiency, or reputation of either or both of the parties, they cannot be assigned by a party to a third party when such assignment will prejudice the interest of the other party to the original contract.⁵ Notwithstanding the rule that a bare right of litigation is not assignable, rights of action for breach of contract or in tort can be the subject of a valid legal assignment in cases where, before the Supreme Court of Judicature Act, 1873, equity would have compelled the assignor to exercise his rights against the contract-breaker or tortfeasor for the benefit of the assignee. Accordingly, an assignment by an assured to his insurer of the assured's rights against the contract-breaker or tortfeasor rendered the right assigned enforceable by the insurer in his own name.⁶

Further English cases of assignment of choses in action.—An assignment of a bare right of litigation is, as we have seen above, bad in equity no less than in law.⁷ There is however a distinction between a right of litigation and a right of property to which litigation is necessarily incidental. Equity permits assignment of a right of property to which litigation is necessarily incidental.⁸ Where a chose in action was equitable the assignee could sue in his own name.⁹ A pecuniary legacy was an equitable chose in action.¹⁰ Where the chose in action was legal, equity, acting on the maxim "Equity acts in personam", would compel the assignor to give the use of his name to the assignee, and would forbid him, on pain

1. *The British Waggon Co. and the Parkgate Waggon Co. v. Lea & Co.* (1880), 5 Q.B.D. 149.

2. *Prosser v. Edmonds* (1885) 1 Y. & C. (Ex.) 481; *Glegg v. Bromley*, [1912] 3 K.B. 474, 491; *Compania v. Pacific Navigation Co.*, [1964] 1 All E.R. 216 Q.B.D.

3. *Dawson v. Great Northern and City Ry.*, [1905] 1 K.B. 260; *Ellis v. Torrington*, [1920] 1 K.B. 399; *Williams v. Protheroe* (1829), 2 Moo. & P. 779; *Glegg v. Bromley*, [1912] 3 K.B. 474, 490.

4. *Defries v. Milne*, [1913] 1 Ch. 98.

5. *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd.*, [1902] 2 K.B. 660, 670; *Stevens v. Benning* (1854), 1 K. & J. 161 *affd.* (1855), 6 De G.M. & G. 223; *Reade v. Bentley* (1857), 3 K. & J. 271; *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21; *Kemp v. Baerselman*, [1906] 2 K.B. 604; *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014, 1020; [1940] 3 All E.R. 549, 552.

6. *Compania v. Pacific Navigation Co.*, [1964] 1 All E.R. 216 Q.B.D.

7. *Prosser v. Edmonds*, (1835) 1 Y. & C. (Ex.) 481; *Dawson v. G. N. Ry.*, [1905] 1 K.B. 260; *Defries v. Milne*, [1913] 1 Ch. 98.

8. *Dickinson v. Burrell*, (1866) L.R. 1 Eq. 337.

9. *Warmestery v. Tanfield*, (1628) 1 Rep. Ch. 29.

10. *Deeks v. Strutt*, (1794) 5 T.R. 690; *Braithwaite v. Skinner*, (1839) 5 M. & W. 313.

of personal constraint in case of constumacy, to sue on his own account.¹ For an equitable assignment of a legal chose in action no special form was required.² Even a parol assignment was valid.³

There must be a specified fund, as we have seen before, out of which payment is to be made.⁴

There must be clear intention to assign.⁵ Notice must be given to the debtor. Until the debtor receives notice of the assignment he is at liberty to go on paying his original creditor, and the assignee has no claim against the debtor for the sums so paid.⁶ Notice and not mere gossip of the assignment binds the debtor.⁷ The date of notice to the debtor is the date of its reception by him.⁸ As between several assignees of the same chose in action, priority will belong not to the assignee who is first in point of time, but to the assignee who has first given notice of the assignment to the debtor or trustee in question.⁹ Under Section 137 (3) of the English Law of Property Act, 1925, only a written notice will affect priority. Formerly it was not so.¹⁰

The presence or absence of consideration between the creditor and the assignee is no concern for the debtor. As between the assignee and the creditor, however, consideration is essential for an inchoate assignment, that is to say, a mere agreement to assign.¹¹ A completed assignment requires no consideration for its enforceability.¹² In *In re McArdle (deceased) McArdle, v. McArdle*, [1951] 1 All E.R. 905 C.A., the assignee could not enforce her inchoate assignment because it was based on a past consideration. It was observed in this case that a voluntary equitable assignment of a sum of money, to be valid, must be in all respects complete and perfect, so that the assignee is entitled to demand payment from the holder of the fund, and the holder is bound to make payment to the assignee, with no further act on the part of the assignor remaining necessary to perfect the assignee's title.¹³

1. *Perryer v. Halifax*, (1677) Rep. Finch, 299.

2. *Row v. Dawson*, (1749) 1 Ves. Sen. 332.

3. *Heath v. Hall*, (1812) 4 Taunt. 326.

4. *Burn v. Carvalho*, (1839) 4 Mv. & Cr. 690; *Percival v. Dunn*, (1885), 29 Ch. D. 128.

5. *Thomas v. Havis*, [1947] 1 All E.R. 444; *Rodick v. Gandell*, (1852) 1 De G.M. & G. 763; *Ricard v. Prichard*, (1855) 1 K. & J. 277; *Re Kent and Sussex Sawmills* [1947] Ch. 177; *Shamia v. Joory*, [1958] 1 Q.B. 448; See also *Hoare v. Dresser*, (1859) 7 H.L.C. 290; *Holroyd v. Marshall*, (1862) 10 H.L. Cas. 191; *Re Wait* [1926] Ch. 9620; [1927] 1 Ch. 606.

6. *Stocks v. Dobson*, (1853) 4 De G.M. & G. 11; *Bence v. Shearman*, [1898] 2 Ch. 582. As to notice of assignment of a chose in action, see Halsbury's Laws of England, 3d ed., vol. 4, (1953) 488, para. 1010.

7. *Brice v. Bannister*, (1878) 3 Q.B.D. 569; *Curran v. Newpark Cinemas*, [1951] 1 All E.R. 295.

8. *Holt v. Heatherfield Trust*, [1942] 2 K.B. 1. Section 136 of the English Law of Property Act, 1925.

9. *Dearle v. Hall*, (1828) 3 Russ. 1.

10. *Lloyd v. Banks*, (1868) L.R. 3 Ch. 488.

11. *Antrobus v. Smith*, (1806) 12 Ves. 39.

12. *Re Patrick*, [1891] 1 Ch. 82.

13. *Per Evershed*, M.R.; *Jenkins & Hudson*, L.JJ.

The assignee takes the chose in action subject to equities.¹ A holder of a bill of exchange can take the bill free from all equities.² No one can however be a holder in due course unless the bill which he holds is complete and regular on the face of it.³

The interest to be assigned must be assignable. Salaries attached to public offices are not assignable. This is so on the ground of public policy. Pensions are also not assignable unless they are exclusively for past services.⁴ An assignment tainted with maintenance is not permitted.⁵ A bare right of action in tort cannot be assigned.⁶ As opposed to the right of action itself, the fruits of an action in tort are assignable.⁷ As noted before, a bare right of action is not assignable, but a right of property which can be recovered only by litigation can be assigned.⁸

In *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014, it was held that where an order was made by the Court under Section 154 of the Companies Act, 1929, or now under Section 208 of the English Companies Act, 1948, for the amalgamation of two companies, a contract of service existing at the date of the amalgamation between a workman and the transferor company did not automatically become a contract of service between the workman and the transferee company.⁹ In some cases the personal nature of the contractual rights prevents the assignment from being enforceable.¹⁰ In *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd.*, [1903] A.C. 414, it was held by a majority¹¹ of the House of Lords that a contractor who had agreed to supply a company for fifty years with chalk from his quarry for its cement works was bound by the contract to supply on the same terms another company who had purchased the undertaking together with the premises on which it was carried on¹². Upon the true construction of the contract it was read as if it had been expressed to be made with the Imperial Company, its successors and assigns, owners, and occupiers of the works. It was held that the Associated Company was entitled to the benefit of the contract, and could enforce it by action

1. *Holt v. Heatherfield Trust*, [1942] 2 K.B. 1; *Mangles v. Dixon*, (1852) 3 H. L. Cas. 702.

2. *Miller v. Race*, (1758) 1 Burr. 452.

3. *Whistler v. Forster*, (1863) 14 C.B. (N.S.) 248; Section 29 of the (English) Bills of Exchange Act, 1882.

4. *Wells v. Foster*, (1841) 8 M. & W. 151.

5. *Dawson v. G. N. R.*, [1905] 1 K.B. 260, 270 (*per* Stirling, L. J.)

6. *Defries v. Milne*, [1913] 1 Ch. 98.

7. *Glegg v. Bromley*, [1912] 2 K.B. 474. See Hanbury, *Modern Equity*, 8th ed., 1962, 79.

8. *Ellis v. Torrington*, [1920] 1 K.B. 399; *Dawson v. G. N. R.*, [1905] 1 K.B. 260.

9. Lord Romer dissenting.

10. *Stevens v. Benning*, (1854) 1 K. & J. 168; *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21; *Hole v. Bradbury*, (1879) 12 Ch. D. 886; *Robson and Sharpe v. Drummond*, (1831) 2 B. & Ad. 303; *In the Estate of Skinner*, *decd.*, [1958] 1 W.L.R. 1043.

11. Lords Macuaghten, Shand, and Lindley.

12. The Earl of Halsbury, L.C. *doubted*, and Lord Robertson *dissented*.

without joining the Imperial Company as plaintiffs. In *Kemp v. Baerselman*, [1906] 2 K.B. 604 C.A., the contractor had agreed to supply the contractee, a cake manufacturer, with all the eggs he should require for manufacturing purposes for one year. He was held as not bound to supply the assignee. It was observed by their Lordships that the contractor's contract was with the contractee personally. Hence the benefit of it was not assignable, and the defendant was discharged from his obligation.

An option in a lease for the lessee to purchase the reversion creates in favour of the grantee a chose in action or equitable interest in the land which is assignable, except in a case where assignability is prohibited by some rule of law, such as the rule against perpetuities, or the option is personal to the grantee; but the option does not of itself constitute a contract.¹

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Effect of accepting performance from third person.

Acceptance of performance from a third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. As it has been held in *Chandrasekhara v. Vittala*, A.I.R. 1966 Mys. 84, part performance is not enough. Before Section 41 can be invoked, it should be established that the performed contract was stronger. Section 41 applies where a contract has been in fact performed by some person other than the person bound thereby.² Section 41 describes one of the methods by which a contract may be discharged. As to the various methods of discharging a contract, see under Section 37, *ante*.

As to the effect of novation see under Section 62, *post*. As to subrogation, too, see *ibid*. See also under Section 30, *ante*. Lesser sum if accepted in full satisfaction of a larger one will discharge the debt for the larger sum.³

Third Party and enforcement.—In *Beswick v. Beswick*, [1965] 3 All E.R. 858, the plaintiff's claim failed because the agreement did not on its true construction create a trust in favour of the plaintiff. As it has been seen at page 222, *ante*, the *jus quaesitum tertio* was considered by the Law Revision Committee of England in 1937 (Cmd. 5449, paras. 41-49), when they recommended (para. 48) that where a contract by its express terms purported to confer a benefit directly on a third party, the third party should be entitled to enforce the provision in his own name. This recommendation has not yet been implemented by a legislation.

Only a privy to a contract has a right to sue for breach of the contract. The endorsee of a railway receipt is not entitled to sue the Railway Administration merely by reason of the endorsement. See *Ibrahim v. Union of India*, A.I.R. 1966 Guj. 6. See also page 216-232, *ante*.

1. *Re Button's Lease*, [1963] 3 All E.R. 708.

2. *Har Chandi v. Sheoraj*, (1917) 39 All. 178 P.C.

3. *Kapurchand v. Himalaya Khan*, A.I.R. 1963 S.C. 250.

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of joint liabilities.

Devolution of joint liabilities.—When two or more persons have made a joint promise, such promisors must jointly fulfil the promise. If any of the joint promisors die, his representative or representatives will be jointly responsible for the performance along with the surviving promisor or promisors. If all the original promisors die then the representatives of all such promisors will be jointly responsible for the performance of the promise. This general rule is, of course, subject to a contrary intention appearing from the contract.

Section 42 prescribes the devolution of joint liabilities.¹ Where there are joint promisors there is an implied contract amongst them, *inter se*, to contribute equally towards the performance of the joint promise. This implied contract of contribution is independent of the contract as between the joint promisors on the one hand and the promisee on the other.²

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Any one of joint promisors may be compelled to perform.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution

If any one of two or more joint promisors make default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Sharing of loss by default in contribution.

Explanation.—Nothing in this Section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

1. *Mahadeosingh v. Balmukand*, A.I.R. 1948 Nag. 279.

2. *Narendra v. Pashupati*, A.I.R. 1949 Cal. 242.

Illustrations

(a) *A, B and C* jointly promise to pay *D*, 3,000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3,000 rupees.

(b) *A, B and C* jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate, and 1,250 rupees from *B*.

(c) *A, B and C* are under a joint promise to pay *D* 3,000 rupees. *C* is unable to pay anything, and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B*.

(d) *A, B and C* are under a joint promise to pay *D* 3,000 rupees, *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

Joint promise.—Where two persons bind themselves, without more, that they or one of them will do something the obligation is joint; where they bind each of them, the obligation is several; where they bind themselves and each of them the obligation is joint and several. In cases of joint contract or joint debt as distinguished from joint and several contract or joint and several debt, in England, there is only one cause of action.¹

A promise made by several persons jointly is called a joint promise. Unlike the English law the Indian law makes all joint liability joint and several, in the absence of any agreement to the contrary.² It is open to the promisees to sue any one or some of the joint promisors, and it is no defence to such a suit that all the promisors must have been made parties.³

Section 43 speaks of two or more persons making a joint promise, in which case any one of the joint promisors may be compelled to perform the whole of the promise. The Section does not apply where parties become jointly liable as heirs by operation of law on a contract made by a single person.⁴

Section 43 applies to partners of a firm, and a plaintiff is entitled to sue some of the partners of a firm on the basis of the contract entered into with the firm even though the suit is not laid against the firm under Order 30, Rule 1, of the Code of Civil Procedure. The failure to implead all the partners as defendants is not fatal to the maintainability of the suit. No doubt Order 1, Rule 6, of the Code of Civil Procedure does not speak of joint liability but relates to several *and* joint liability, but the effect of Section 43 of the Contract Act is to render joint liability into joint and several liability. Order 30, Rule 1, only prescribes a convenient procedure for suing a firm. It does not vary or abrogate the right which is available to the plaintiff under the provisions of Section 43 of the Contract Act. Nor does Order 30, Rule 1, control or override the provisions of Order 1, Rule 6.

1. Stroud's Judicial Dictionary, 3rd ed., 1952, vol. 2, 1528.

2. *Union of India v. East Bengal River Steamer Service, Ltd.*, A.I.R. 1964 Cal. 196.

3. *Jainarain v. Surajmull*, A.I.R. 1949 F.C. 211; *Jodh Singh v. Kesar Singh*, A.I.R. 1959 J. & K. 86.

4. *Soorayya v. Kateeza*, A.I.R. 1957 Andhra 688; *Shaik Sahed v. Krishna Mohan*, A.I.R. 1917 Cal. 829; *Hazara Singh v. Naranjan Singh*, A.I.R. 1929 Lah 783.

The plaintiff can well choose to sue the partners without bringing on record the firm itself. He is equally entitled to bring an action against only some of the partners. Order 30, Rule 1, which merely prescribes the procedure in case the plaintiff desires to sue the firm does not in any manner affect this right of the plaintiff.¹

If one of the directors of a company alone appointed a broker and entered into the contract, the former can certainly be made liable on its basis and the fact that the other two co-directors had also been impleaded and the suit had been dismissed against them could not in any way affect the liability of the director who entered into the contract. The fact that the earnest money was accepted by the other directors who possessed a receipt for it was immaterial, those directors being the joint promisors.² A compromise between the liquidator of a company in liquidation and a contributor was not binding on the company in a voluntary winding up unless and until sanctioned by an extraordinary resolution of the company as provided in Section 234 of the Companies Act, 1913.³

Joint tort.—To constitute a joint tort there must be one *damnum* and one *injuria*. Where two negligent persons have caused one damage, the question whether they are joint tortfeasors depends on the amount of connection between the act of the one and that of the other; each case depends on its own circumstances. Where the cause of action against the tortfeasors is the same, it is one of the cases of joint tort.⁴

Where two or more persons have so conducted themselves, as to be liable to be jointly sued, each is responsible for the injury sustained by reason of their common act.⁵ Where several persons so concur in some act or default which is tortious that each of them is responsible for the breach of duty, they are called tortfeasors. A person whose legal right is injured by a tort so committed has a right of action against any or all of such joint tortfeasors, unless he stands in such a relation to one of them as to be responsible for his act or default. The fact that two or more persons have concurred or assisted in or contributed to an act which has caused damage is not of itself sufficient to make such persons jointly liable, unless by reason of a joint duty being owned to the person who has suffered damage, or on some other ground, relief may be claimed against such persons jointly.⁶ As to joint tortfeasors, see *Joint tortfeasors*, below

1. *Jodh Singh v. Kesar Singh*, A.I.R. 1959 J. & K. 96; *Pramode v. Swadesh*, A.I.R. 1964 Tripura 13.

2. *Raja Ram v. Ganesh*, A.I.R. 1959 All. 29.

3. *Liquidator, Union Bank of India v. Gobind Singh*, (1923) 4 Lah. 239. Now see Companies Act, 1956, S. 512.

4. *The Koursk*, [1924] p. 140; *C. A. Brooke v. Bool*, [1928] 2 K.B. 578.

5. *De Bodreugam v. Arcodekene*, (1302) Y.B. 30 Edw. 1 (Rolls Series), 106; *Clark v. Newsam*, (1847), 1 Exch. 139.

6. See Halsbury's Laws of England, 2d. Vol. XXXII, 1939, p. 187 *et seq.* or Halsbury: 3d ed., vol. 37, 1962, title TORT.

Joint promise and survivorship.—In England, on the death of one of the persons by whom a joint promise has been made the liability devolves upon the survivors, the representatives of the deceased being under no liability.¹ In India, Section 42 of the Contract Act, 1872, lays down the rule governing the devolution of joint liabilities. A promissory note was renewed after the death of a partner by the surviving partners. The suit on the promissory note was compromised by the surviving partners. A suit against the estate of the deceased partner was not maintainable.²

Joint and several promise.—Where several persons join and make a promise to the same person or persons, and at the same time each of the said promisors makes the very same promise separately to the same promisee or promisees, the promise is called a joint and several promise. The individual promisors by such promise incur, each, joint and several liability. The liability being both joint and several, the promisee or promisees may at his or their option bring separate actions against each of the promisors. He or they may also bring only one action against them all.³ If any of these joint and several promisors die, the personal representatives of the deceased will be liable jointly and severally with the survivors.⁴ See under Section 42, *supra*.

The question whether a promise made by two or more persons is several or joint or both joint and several is one of construction, and depends upon the intention of the parties as expressed in the contract.⁵

Where the liability is joint and several, Section 43 of the Indian Contract Act will be applied.⁶ Where the liability was joint and several, a suit would lie against some of the members of an association.⁷

Where a number of persons are jointly and severally liable to satisfy a decree, it is open to the decree-holder (who is in the position of a joint promisee) to compel any one or more of the judgment-debtors (who are in the position of joint promisors) to satisfy the whole of the decree. The judgment-debtors who while such decree is subsisting against them have been so compelled to perform the promise can claim contribution from the others who have not satisfied the decree (according to their shares). This liability to contribution is not affected in any way by the release of some of

1. See *Halsbury's Laws of England*, 3rd ed., 1954, vol. 8, p. 61.

2. *Markandrai v. Virendrarai*, (1917) 19 Bom. L.R. 837.

3. *King v. Hoare*, (1844) 13 M. & W. 491, 505; *Beecham v. Smith*, (1858) E. B. & F. 442; *Owen v. Wilkinson*, (1858) 5 C.B.N.S. 526; *Re Jeffery, Ex parte Honey* (1871) 7 Ch. App. 178.

4. *Cock v. Cross*, (1672) 2 Lev. 73; *Church v. King*, (1836) 2 My. & Cr. 220; *Tippins v. Coates* (1853), 18 Beav. 401; *Burns v. Bryan (or Martin)*, (1887), 12 A.C. 184; *H. L. Read v. Price*, [1909] 2 K.B. 724 C.A.

5. *Fell v. Goslin*, (1852) 7 Exch. 185; *Cooke v. Seeley*, (1848) 2 Exch. 746; *Burns v. Bryan (or Martin)*, (1887) 12 A.C. 184 *H. L. White v. Tyndall*, (1888) 13 A.C. 263 H.L. at p. 275.

6. *Gopendra v. Golokendra*, A.I.R. 1955 Cal. 62; *Promode v. Swadesh*, A.I.R. 1964 Tripura 13.

7. *Appa Dada v. Ramkrishna Vasudeo*, (1929) 53 Bom. 652.

the judgment-debtors by the decree-holder from the performance of the promise unless a contract to the contrary between all the parties liable to contribute has been established.¹

The liability of joint holders of a fixed-rate tenancy of payment of rent is joint and several, and not joint only. The failure, therefore, of the plaintiff in a suit for rent against several fixed-rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants.²

An endorsement of a hundi by a firm in favour of one of its partners does not create any liability as between the partner and the firm, and the partner is not entitled to enforce that liability in a suit against the firm. The only way in which the liability can be enforced is by filing a suit against the other partners for taking partnership accounts.³

A promisee is entitled to realize the entire sum due to him from all the executants of the promissory note executed in his favour or from any one of them individually. The fact that as between the promisors one of them is only a surety does not detract from the right of the promisee to collect the entire amount under the contract law from such surety. Where one of the joint promisors is only a surety, any of the other promisors cannot claim contribution from him for the amount paid by him in excess of his share in order to absolve himself from the liability to the original promisee. Paragraph 3 of Section 43 does not contemplate cases where one of the joint contributors has not paid and the others have to pay the sum though those others received the benefits in the original contract in unequal proportions. Section 43 does not envisage such a contingency. It seems to be a *casus omissus*. It only speaks of the liability of all the promisors to the original promisee and, *inter se*, the right of any one of the promisors to claim the excess amount from the other promisors.

Where one of the joint promisors liable to contribute does not or cannot pay his proportion of debt his amount of debt has to be divided between other contributories only in the proportion of the benefits which each one of them has received at the time of the original contract and not in equal proportion.⁴

Where a mortgage is executed by several persons, the mere fact that some of them are minors and pardanishin ladies who had not executed the deed in accordance with law cannot make the execution by the rest invalid. The mortgage would be valid and binding against the rest. The reason is that the liability of the mortgagors being joint and several, the mortgagee can realize the whole of the debt from any one of them.⁵ Where the co-promisors

1. *Shankarlal v. Motilal*, A.I.R. 1957 Raj. 267.

2. *Abdul Aziz v. Basdeo Singh*, (1912) 34 All. 604.

3. *Mohammed Siddiq v. Mohamed Akbar*, A.I.R. 1951 Cal. 466.

4. *Kakkothaya v. Derinjithaya*, A.I.R. 1951 Mad. 239.

5. *Keka v. Serajuddin*, A.I.R. 1951 All. 618.

are alternatively liable, a judgment obtained against one of them bars the creditor from proceeding against the others.¹

Joint tenancy in England.—In England, a limitation, either at common law or in a conveyance to uses or in a will, of estates of the same nature to to several, either nominatim or as a class, without more, makes them joint tenants. This is not a rule of tenure, or of real property law exclusively. It also applies to personalty, e.g., to terms of years, policies, and patents; thus, a grant of a patent to “*A and B, their executors, administrators and assigns*”, creates a joint tenancy in *A and B*, with all its incidents.²

In England, joint tenancy is created where the same interest in real or personal property is, by the act of the party, passed by the same matter of conveyance or claim *in solido*, and not as merchandise, or for purposes of speculation, to two or more persons in the same right, either simply, or by construction or operation of law jointly, with a *jus accrescendi*, that is, a gradual concentration of property from more to fewer, by the accession of the part of him or them that die to the survivors or survivor, till it passes to a single hand, and the joint tenancy ceases. An estate cannot be granted to two or more jointly and severally, for severally is repugnant and they take as joint-tenants.

When an estate is granted to two or more persons without any modifying and disjunctive words, they take, according to the English common law rule, as joint-tenants. For example, if an estate be granted to *A and B* for their lives, they become joint-tenants of the freehold; if to *A and B* and their heirs, they are then joint-tenants of the fee.

While the English equity recognizes the above rule, yet it has laid down many exceptions to it, amongst the most important of which are the following :

(1) If two join in lending money on mortgage, though they take a joint security, yet equity holds that it could never have been intended that their interests should survive, the fair presumption being that each means to lend his own money, and to be repaid his own again. The consequence is, that on the death of one the survivor who holds the entire legal estate by survivorship is deemed by equity in England a trustee for the personal representatives of the deceased co-mortgagee until the money be repaid. Equity then treats the two mortgagees as tenants in common.

(2) When two persons purchase, in England, an estate, and advance the purchase-money between them in *unequal* portions, equity treats them as tenants in common, notwithstanding the transfer be made to them generally, but the inequality must appear on the face of the conveyance. If, however, the consideration—money be paid by them in *equal* portions, and the transfer is general, then equity has not any ground to infer that this was not a joint purchase of the chance of survivorship, and they must be deemed, in

1. *National Petroleum Co. Ltd. v. Popatlal Mulji*, (1936) 38 Bom. L.R. 610.

2. *National Society for Distribution of Electricity v. Gibbs*, [1899] 2 Ch. 289; Stroud's *Judicial Dictionary*, 3d ed., 1952, vol. 2, 1531.

England, even in equity, as joint tenants. See Section 45 of the (Indian) Transfer of Property Act, 1882.

(3) When partners in trade purchase property for the partnership concern equity treats them as tenants in common, holding the survivor to be trustee of the legal estate for the personal representatives of the deceased partner as to his share. Wares, merchandise, and stock in trade belonging to partners, survive to the representatives of the deceased partner.

The right of survivorship in case of joint tenancy in England is necessarily reciprocal; for otherwise there would be different degrees of interest in the same estate, which is inconsistent with the nature of joint-tenancy.¹

The chief practical incident which distinguishes a joint tenancy from a tenancy in common is the *jus accrescendi*, as noted before, of joint tenant, i.e., the right of the survivors or survivor to the whole property. The court leans strongly against that right, and frequently adjudicates "a tenancy in common by construction on the intent of the parties".²

Tenancy in common in England.—In England, "TENANTS in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joyant title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joyant title, and their occupation and possession shall be by law between them in common, they are called tenants in common", (Litt., S. 292). See *Co. Litt.*, 188.b.

"A limitation to, or trust for, several, either nominatim or as a class, with any words implying a distinctness of interest, makes them tenants in common."³

This estate is created in England when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares, and either by the same act or by several acts, and by several titles, and not a joint title. A tenancy-in-common will, as a rule, be construed to exist wherever the instrument creating it indicates that the land is to be held in shares, equally, or in moieties, or the nature of the transaction is such as to preclude the intention of survivorship such as an acquisition of land by partners for the purposes of their business.

A tenancy-in-common differs from a joint tenancy in this respect: joint tenants have one estate in the whole, and no estate in any particular part;... Tenants-in-common have several and distinct estates in their respective parts which may be in unequal shares and for estates of unequal duration... Each tenant-in-common has, in contemplation of law, a distinct

1. Wharton's *Law Lexicon*, 14th ed., 1953, 540-42.

2. Stroud's *Judicial Dictionary*, 3d ed., 1952, vol. 2, 1531.

3. Stroud, *ibid.*, vol. 4, p. 2988.

tenement and a distinct freehold.... Tenants-in-common hold by unity of possession, because neither of them knows his own severalty, and therefore they all occupy promiscuously.... There being no entirety of interest among tenants-in-common, each is seised of distinct though undivided share; they hold neither 'per mie' (not at all) nor 'per tout' and consequently the *jus accrescendi* does not apply to them.¹

To quote *Littleton*, Section 292 (for which see *Coke upon Littleton*, 189.a.) : "...the essential difference between joyntenants and tenants in common is that joyntenants have the lands by one joint title and in one right, and tenants in common by severall titles, or by one title and by severall rights; which is the reason, that jointenants have one joint freehold, and tenants in common have severall freeholds. Only this property is common to them both, viz. that their occupation is individed and neither of them knoweth his part in severally."

As to joint tenancy and tenancy in common generally, see *Coyle v. M'Fadden*, [1901] 1 Ir. R. 298 : S.C. 35 I.L.T.R. 93 ; *Smith v. Savage*, [1906] 1 Ir. R. 469.

The concept of joint tenancy in India.—Section 45 of the Transfer of Property Act, 1882, prescribes the incidents of joint transfer for consideration. Section 45 lays down :

"Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

"In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property."

The Section does not deal with the question whether the transferees take as joint-tenants or as tenants-in-common. In case of legacy, the law is that a legacy does not lapse if one of two joint legatees die before the testator. Section 106 of the Indian Succession Act, 1925, lays down that if a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole. If however a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.² Even in the cons-

1. Wharton, *ibid.*, 980.

2. Section 107, *ibid.*

truction of a will the tendency of the Court is to lean against joint tenancy.¹ A joint tenancy has been recognized in a gift by will of an Indian Christian and that of a Parsee. In *Arakal Joseph v. Domingo Inas*, (1911) 24 Mad. 80, it was observed that where there were no words in an instrument of gift of property to several persons indicating an intention to create tenancies in common there would be a presumption that the donees would hold the property as joint tenants and not as tenants in common. In *Navroji v. Perozbai*, (1899) 23 Bom. 80, Jehangirji Nussseerwanji Wadia's will was construed as having given joint tenancy rights to his grandsons.

In *Jogeswar Narain v. Ram Chandra*, (1896) 23 Cal. 670 P. C., a Hindu testator bequeathed a 4-anna share of a zamindari to his youngest widow and her son. The will was construed as to have given to each of the two legatees an absolute interest in a 2-anna share of the testator's estate. Apart from Section 106 of the Indian Succession Act, 1925, cited above, among the Hindus the principle of joint tenancy has been recognized only in case of co-parcenary between members of an undivided family.

This view has been accepted in several decisions.² But even if the grantees are members of a co-parcenary they take as tenants-in-common³ unless a contrary intention appears from the grant.⁴

Cases of joint tenancy.—Cases of joint tenancy are not however rare.⁵

The expression 'as joint tenants' is, no doubt, a technical expression, but its import may be controlled by a context so that, notwithstanding that expression, a tenancy in common may be created.⁶ In an action in ejectment all persons in possession should be impleaded as defendants.⁷

Joint tortfeasors.—Tortfeasor is a wrongdoer. As to who are joint tortfeasors see Halsbury, 3d ed. title TORT. According to the common law of England no right of contribution existed between tortfeasors. Therefore, if *A* recovered in tort against *B* and *C*, and levied the whole of the damage

1. *Adm Gen. of Madras v. Money*, (1892) 15 Mad. 448, 469. *Jogeswar v. Ram Chandra* (1896) 23 Cal. 670, 679 P.C. *Har Prasad v. Shukhdevi* (1915) 37 All. 241, 246.

2. *Gopi v. Jaldhara*, (1911) 33 All. 41. *Jio v. Rukuran*, (1927) 8 Lah. 219 : A.I.R. 1927 Lah. 126.

3. *Bai Diwali v. Patel Becharadas*, (1902) 26 Bom. 445. *Kishori v. Mundra*, (1911) 33 All. 665. *Ram Piari v. Krishna Piari* (1921) 43 All. 600 : A.I.R. 1921 All. 50. *Janakiram v. Nagamony* (1926) 494 Mad. 98 : A.I.R. 1926 Mad. 273. *Bhoba Tarini v. Peary Lall* (1897) 24 Cal. 646, 653. *Sankaranarayana v. Koppaya*, A.I.R. 1926 Mad. 236. *Damodardas v. Dayabhai* (1897) 21 Bom. 1, 15. *Munnu v. Umrao*, 39 P.R. 1909 : 1 I.C. 720 : 59 P.L.R. 1909 : 55 P.W.R. 1909.

4. *Yethirajulu v. Mukunthu*, (1905) 28 Mad. 363. *Narpat v. Md. Ali* (1885) 11 Cal. 1 P.C.

5. *Bhoba Tarini v. Peary Lall*, (1897) 24 Cal. 646. *Bai Mamubai v. Dossa Morarji* (1891) 15 Bom. 443. *Jairam Narronji v. Kuverbai*, (1885) 9 Bom. 491, 509. *Navroji v. Perozbai*, (1899) 23 Bom. 80, 97, 98. *Shyam Bhai v. Purushothamados*, A.I.R. 1925 Mad. 645, 653. *Nagalingam v. Ramachandara*, (1901) 24 Mad. 429, 437. *Yethirajulu v. Mukunthu*, (1905) 28. Mad. 363, 373. *Venkataramiah v. Subramaniam*, 16 M.L.T. 489 : 26 I.C. 393. *Indoji v. Kothepalli Ramchandra*, 54 I.C. 146. *Raja Rajeswara v. Sundra*, 27 M.L.J. 694 : 27 I.C. 283.

6. Stroud, *ibid.*, vol. 2, 1532.

7. *Damodar v. Kanchan*, A.I.R. 1963 Orissa 140.

against *B*, *B* could not recover anything from *C*.¹ The principle underlying this decision was that no presumed contract to subscribe to the commission of a wrong would be enforced.² This rule was confined to cases where the person seeking relief was aware that he was committing an unlawful act.³ After the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 and 26 Geo. 5, c. 30)⁴ in England now there is a statutory right of contribution between joint tortfeasors.

Following the common law of England, in India, too, it was, earlier, held that the rule of contribution was not applicable to joint tortfeasors.⁵ It was however conceded that whether the rule against contribution between joint tortfeasors would apply in a given case was an issue of construction.⁶ It was in *Dharni Dhar v. Chandra Shekhar*, A.I.R. 1951 All. 774, a full bench decision, that it was observed that the English rule formulated in *Merryweather v. Nixan* (1799) 8 Term. Rep. 186 : 101 E.R. 1337, namely, that there is no contribution among joint tortfeasors has no application to cases in India. See however *Baldeo v. Harbhajan*, A.I.R. 1963 Patna 227.

In a suit for damages where a joint decree has been obtained, there is a right of contribution among the defendants, *inter se*, only if the wrong complained of were committed under *bona fide* claim of right.⁷ Although it may have been rightly held in the former suit that both the judgment-debtors were jointly liable for the mesne profits of land for three years, it will still be open to the defendant in the suit for contribution to show that the plaintiff alone enjoyed those profits; and in that case the plaintiff will not be entitled to contribution.⁸

The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all depends upon the question whether the defendants in the former suit were wrongdoers in the sense that they knew, or ought to have known, that they were doing an illegal or wrongful act. In that case no suit for contribution will lie. If the defendants in the former suit, were not guilty of wrong in that sense, but acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did, then they may have a right of contribution, *inter se*; and in such case the Court should enquire what share they each took in the transaction.⁹

1. *Merryweather v. Nixan*, (1799), 8 Term. Rep. 186.

2. *Per Lord Halsbury in Palmer v. Wick and Pulteneytown Steam Shipping Co.*, [1894] 2 A.C. 318, 333.

3. *Pearson v. Skelton*, (1836) 1 M. & W. 504.

4. See Section 6 (1) (c), *ibid*.

5. *Manja and Kadugochen*, (1884) 7 Mad. 89. *Yegnarayana v. Yagannadha*, A.I.R. 1932 Iad. 1. *Baldeo v. Harbhajan*, A.I.R. 1963 Patna 227.

6. *Lakshmana v. Rangaswami*, (1894) 17 Mad. 78.

7. *Subut Singh v. Imrit Tewari*, (1880) 5 Cal. 720 : 6 C.L.R. 62.

8. *Siva Panda v. Jujusti Panda*, (1902) 25 Mad. 599.

9. *Subut Singh v. Imrit Tewari*, (1880) 5 Cal. 720 : 6 C.L.R. 62.

After a decree has been obtained against two or more tortfeasors which imposes a joint and several liability upon each one of the judgment-debtors, if one of them is made to pay the entire amount of the decree, justice and fair play require that he should be able to share the burden with his co-peers, namely, the other joint judgment-debtors. Further, a tortfeasor may recover contribution from any other tort-feasor who is, or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise. The question whether contribution is actually recoverable and, if so, in what proportion, would necessarily depend on various factors and principally on the facts of the particular case. Apportionment of the entire liability is to be made in such proportions as the Court thinks just and equitable, having regard to the extent of the moral responsibility of the parties concerned for the damage caused. This is so, even in the case of conscious tortfeasors.¹

A person who has been called on to pay a sum of money by reason of his own negligence cannot require contribution in respect of such sum. *A* and *B* being jointly liable to pay a sum of money, *A* negligently pays part thereof to persons not entitled; he will be unable to make *B* contribute thereto.² Persons are not joint tortfeasors merely because their independent wrongful acts have resulted in one damnum.³ When the claim is based on the terms of a compromise, the rule that there is no right of contribution amongst jointfeasors has no application.⁴ Where collusion is proved, suit for contribution is not maintainable where the parties are joint wrong-doers.⁵ The rule preventing one wrong-doer from claiming contribution against another is confined to cases where the person seeking relief must be presumed to have known that he was acting illegally.⁶ In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants, and the amount of this decree was levied by execution from *A* alone. *A* could bring a suit for contribution against his co-defendants in the former suit.⁷

The responsibility of a joint promisor.—When two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise. *A*, *B* and *C* jointly promise to pay *D* Rs. 3,000. *D* may compel either *A* or *B* or *C* to pay him Rs. 3,000. He may also compel any two or all of the promisees to pay the sum of Rs. 3,000. Where a promise was intended to be made by several persons jointly, and one or more of those persons failed to enter into the agreement or to execute

1. *Dharni Dhar v. Chandra Shekhar*, (F.B.) A.I.R. 1951 All. 774.

2. *M'Ilreath v. Margetson*, (1785), 4 Doug. (K.B.) 278.

3. *The Koursk* [1924] P. 140.

4. *Nihal Singh v. Collector of Bulandshahr*, (1916) 38 All. 237.

5. *Gobind v. Srigobind*, (1897) 24 Cal. 330.

6. *Kishna Ram v. Rakmini Sewak*, (1887) 9 All 221.

7. *Brijendra Kumar v. Rash Behari*, (1886) 13 Cal. 330.

the instrument of the agreement, there would be no contract, and therefore no liability could be incurred by such of them as had entered into the agreement.¹ Similarly, one of the parties cannot introduce a limitation of his liability without the consent of the other promisors.² In the case of a joint promise each of the promisors is liable as between himself and the promisee to perform the whole of the contract.³ Where he alone is sued on the contract, he is entitled to have the other promisors joined as defendants.⁴ Limitation in favour of one of the joint promisors does not bar the other paying promisors from realizing contribution from the co-promisor against whom the remedy was barred by limitation.⁵

When a joint promise is not enforceable against some of the promisors.—Where a joint promise is not enforceable against some of the promisors, it will be binding on the rest. In *Jamna Bai v. Vasanta Rao*, (1916) 39 Mad, 409 P.C., a compromise being made on behalf of a minor without having complied with the requirements of Section 462 of the Code of Civil Procedure, 1882, as to obtaining the leave of the Court, was not enforceable against the minor. The fact that a joint bond executed as a part of the compromise was not enforceable against the minor, did not absolve the other obligee from liability. In *Sankole v. Badridas*, A.I.R. 1926 Nag. 196, a joint contract was unenforceable against one of the promisors on the ground of his not signing the contract; it was however held enforceable against the other promisor signing the agreement and receiving the consideration. In the case of a joint purchase by two vendees of whom one was a minor and the other major, the money could be recovered from the major vendee alone.⁶

Where the liability for the mortgage money is joint and several as against the mortgagors and the subsequent transferees, and as against the several mortgage properties in their hands, the fact that the liability cannot be enforced against some of them on account of bar in law, e.g., by provisions in the Orissa Money-lenders Act, 1939, will not exonerate others. It is also open to the mortgagee to enforce the entire mortgage liability against a part of the mortgage properties absolving the rest. It is an incident of liabilities which are joint and several.⁷

Equity and contribution.—The right and duty of contribution is founded on doctrines of equity; it does not depend upon contract.⁸ A

1. *National Provincial Bank of England v. Brackenbury*, (1906) 22 T.L.R. 797. *Coopers v. United Contract Corp., Ltd.*, (1897) 14 T.L.R. 29. *Royal Albert Hall Corp. v. Winchilsea*, (1891) 7 T.L.R. 362 C. A. See however below.

2. *Ellesmere Brewery Co. v. Cooper*, [1896] 1 Q.B. 75.

3. *Richards v. Heather*, (1817) 1 B. & Ald. 29. *Mountstephen v. Brooke*, (1818) 1 B. & Ald. 224. *King v. Hoare*, (1844) 13 M. & W. 494, 505.

4. *Pirie v. Richardson*, [1927] 1 K.B. 448 C.A.

5. *Gurcharn v. Ram Bharose*, A.I.R. 1943 Oudh 218, 224.

6. *Sain Das v. Ram Chand*, (1923) 4 Lah. 394; A.I.R. 1924 Lah. 146.

7. *Govinda v. Venkatakrishnayya*, A.I.R. 1950 Orissa 6.

8. *Kazim Ali v. Sadiq Ali*, A.I.R. 1938 P. C. 169, 174.

common liability is of the essence of the right of contribution.¹ In estimating the amount of contribution to which a plaintiff is entitled to rule in equity is that regard must be had to the number of persons remaining liable and solvent at the time of the payment.² The defendant is not liable to any contribution until the amount actually due from him has been ascertained.³ The plaintiff cannot require other persons to contribute to the costs which he has been compelled to pay in the proceedings establishing his liability.⁴ Where however one of several co-defendants pays the whole of the plaintiff's costs which were ordered to be paid by the defendants, he can obtain contribution in respect thereof from the other co-defendants in the action.⁵ The apportionment of liability should be on the basis of interests.⁶

Contribution is between persons equally bound.⁷ The claim for contribution is based on principles of equity rights of the parties in accordance with rules consistent with justice, equity and good conscience.⁸ Special circumstances may render the general rule of contribution inapplicable.⁹ The liability to contribute is based on an equity arising out of the co-debtor's payment, and it has no reference to the original liability to the common promisee.¹⁰

When one of the judgment-debtors pays off the decretal debt, he has a right to contribution from his co-judgment-debtors, but to what extent and in what proportion may depend upon the circumstances of each case.¹¹

A person in wrongful possession of property can bring a suit for contribution against the person really entitled, if the payment be made in good faith. But if the payment be made with the ulterior motive of creating title, there is no right of contribution.¹²

Where *A*'s title to the estate of *B* (deceased) based upon an alleged will in his favour by *B* is found to be false owing to *A*'s inability to prove the

1. *Joy Chand v. Dole Gobinda*, A.I.R. 1944 Cal. 272.

2. *Hitchman v. Steward*, (1855) 3 Drcw. 271. *Lowe v. Dixon*, (1885) 16 Q.B.D. 455. *Ramskill v. Edwards*, (1885) 31 Ch. D. 100.

3. *Sharpe v. Cummings*, (1844) 2 Dow. & L. 504. *Bates v. Toundley*, (1848) 2 Exch. 152. *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

4. *Knight v. Hughes*, (1828) 3 C. & P. 467; *Gillett v. Rippon*, (1829) Mood. & M. 406; *Roach v. Thompson*, (1830) Mood. & M. 487; *Blyth v. Smith*, (1843) 5 Man. & G. 405; *Tindall v. Bell*, (1843) 11 M. & W. 228; *Pierce v. Williams*, (1854) 23 L.J. Ex. 322. See also the *Millwall* [1905] p. 155 C. A. at p. 176.

5. *Newry Salt Works Co. v. Macdonnell*, [1903] 2 I.R. 454.

6. *Nityananda v. Banamali*, A.I.R. 1962 Orissa 1.

7. *Nandlal v. Ram Kirit*, A.I.R. 1950 Pat. 212.

8. *Bejoy Kumar v. Kusum Kumari*, A.I.R. 1929 Cal. 315.

9. *Jagpati v. Sukhdeo*, A.I.R. 1942 Pat. 204.

10. *Abraham Servai v. Ruphial*, (1916) 39 Mad. 288; *Kazim Ali v. Sadiq Ali*, A.I.R. 1938 P.C. 169, 174.

11. *Mani Lal v. Tirthalal*, A.I.R. 1953 Cal. 513. *Mangarao v. Kishan Rao*, A.I.R. 1965 Andhra 98.

12. *Jinnat Ali v. Fateh Ali*, (1911) 9 I.C. 219; (1910-11) 15 C.W.N. 332.

will, and *A* is not able to prove that he held the estate believing in good faith in his title, *A* cannot recover from *B*'s heirs payments made by him, while he was in possession, to discharge debts due by *B*, whether secured or unsecured unless such payments were made to avert an imminent loss to the estate.¹

Certain properties, which were subject to a common charge for restitution, were purchased by 25 sharers. By a final decree in a partition suit these properties were allotted equally to all the 25 sharers but no provision was made for the discharge of the liability imposed on the properties. There being no agreement among the common purchasers as regards the contribution of this burden at the time of purchase or at the time of the passing of partition decree, the general principle of law, namely, equality of burden and equality of benefit as the basis of the claim for contribution was applicable to the case.²

Both Section 43 of the Contract Act and Section 82 of the Transfer of Property Act deal with the question of contribution. But while Section 43 of the Contract Act deals with contracts generally Section 82 of the Transfer of Property Act applies to mortgages. Where the right to contribution arises out of a mortgage, Section 82 of the Transfer of Property Act will exclude Section 43 of the Contract Act on the principle that when there are a general law and a special law dealing with a particular matter, the special excludes the general.³

Joint promisor's right to contribution.—When one or more of the joint promisors has or have fulfilled or has or have been compelled to fulfil the joint promise in favour of the promisee, he or they may compel the non-fulfilling joint promisor or each of the non-fulfilling joint promisors to contribute equally with himself or themselves to the performance of the joint promise. This rule is however subject to any contrary intention appearing from the contract itself. *A, B* and *C* jointly promise to pay *D* Rs. 3,000. *C* is compelled to pay the whole amount. *A* is insolvent, but his assets are sufficient to ratably pay only one-half of the debts to his several creditors. *C* is entitled to receive only Rs. 500 from *A*'s estate, and $[(Rs. 3,000 - Rs. 500) \div 2 =] Rs. 1,250$ from *B*.

The joint promisor's right to contribution is a statutory one and does not depend on any express agreement between the parties. When the liability was common and one of several persons jointly or jointly and severally liable under a contract is called upon to perform the contract in full or to discharge more than his own proper share, he has the statutory right, under Section 43 of the Indian Contract Act, 1872, to call upon the persons jointly or jointly and severally liable with himself to contribute to the liability which he has incurred. The payment which he has made will be

1. *Saradamba v. Pattabhiramayya*, (1930) 53 Mad. 952.

2. *Meyyappa v. Murugappa*, A.I.R. 1960 Madras 117.

3. *Kedar Lal v. Hari Lal*, A.I.R. 1952 S.C. 47.

treated under Section 43 as a payment to the use of all the co-debtors or co-contractors. This statutory right to contribution can be waived by an express agreement to the contrary. A promisee cannot however in any way absolve a joint promisor from his liability to contribution so far as his other joint promisors are concerned who may have performed the promise.¹ Where on a joint hand-note a decree was passed against all promisors but realized from only one of them, a suit for contribution lay against the other promisors.² Where the liability for rent under a tenancy was joint and several, and one of the tenants paid the whole rent he could get a decree to recover jointly from the others.³ Defendant's title to an eight-anna share in a *jote* having been declared in a suit brought by him against the plaintiff, the latter sued the former for a moiety of the rents recovered from him by the land lord when he was in exclusive possession of the *jote*. *Held*, that the plaintiff was entitled to recover if the payment was made by him in good faith, subject however to a deduction on account of mesne profits realized by him in respect of the defendant's share. If the payment was made with a view to creating title in the entire *jote*, it could not have been made in good faith. It would be a voluntary, payment and one not made lawfully within Section 70 of the Contract Act.⁴

The liability for contribution will arise if the liability that was discharged by one of the parties was the joint liability of both. If on the other hand the liability was the exclusive liability of one, and if that one discharges that liability, he cannot turn round and claim contribution as against the other who was not liable at all, though as against a third party both of them might be liable.⁵ The plaintiff cannot invoke the aid of the Court to compel the defendant to do what he himself was bound to do.⁶

Sharing of loss for non-contribution.—If any one of the non-fulfilling joint promisors makes default in contribution, the remaining of such joint promisors may be compelled in law to bear in equal shares the loss arising from such default. *A, B and C* are under a joint promise to pay *D* Rs. 3,000. *C* is unable to pay anything, and *A* is compelled to pay the whole sum of Rs. 3,000. *A* is entitled to receive $(Rs. 3,000 \div 2) = Rs. 1,500$ from *B*.

See also under Equity and contributions supra.

Surety's rights.—The general provisions of Section 43 do not prevent a surety from recovering from his principal the payments made by the former on behalf of the latter. The same provisions, do not entitle the again, do not entitle the principal to recover anything from the surety on account of payments made by the principal himself. That is to say, the surety obliging himself on behalf of one or several or all of the joint

1. *Narendra v. Pashupati*, A.I.R. 1949 Cal. 242.

2. *Nityanand v. Radhacharan*, A.I.R. 1934 Patna 411.

3. *Nirdosh v. Jakaria*, (1915) 27 I.C. 334.

4. *Jinnat Ali v. Fateh Ali*, (1910-11) 15 C.W.N. 332; (1911) 9 I.C. 219.

5. *Krishnan v. Kannan*, A.I.R. 1955 Mad. 721.

6. *Kuman v. Kameshmar*, A.I.R. 1935 Patna 146.

promisors stands on a different footing from principal debtors as joint promisors. In case he fulfils his own obligation *qua* surety, he will be entitled to recover the payments made on behalf of the principal or principals from such principal or principals even when he or they were only a joint promisor or joint promisors along with other joint promisor or joint promisors. A joint promisor's right to contribution from the other fellow joint promisor or joint promisors cannot be made in law a cloak for him to avoid his own responsibility to his surety. A surety cannot be required to collect contributions from the other joint promisor or joint promisors. The general law governing the relationship of a surety and his principal remains unaffected notwithstanding the provisions of Section 43. That is to say, even though a surety is in the eye of the law only a joint promisor along with the principal debtor *vis-a-vis* the creditor, the surety is only a surety *vis-a-vis* the principal debtor. The rights of joint promisor as against the other joint promisor or joint promisors are not available when any such joint promisor is a surety. *A, B* and *C* are under a joint promise to pay *D* Rs. 3,000. But *A* and *B* are only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum of Rs. 3,000. They are entitled to recover the sum paid from *C*.

As to the law of indemnity and guarantee see Sections 124-147, *post*.

Co-sureties.—The right of contribution exists between co-sureties.¹

Co-insurers.—The right of contribution exists as between co-insurers of the same property, although they contracted independently of one another. Apart from this common law rule,² the English Marine Insurance Act, 1906 (6 Edw. 7, c. 41), Section 80, also provides for the same principle. See also the (Indian) Marine Insurance Act, 1963, Section 80.

The drawer of a bill who is compelled to pay the whole may claim contribution against the endorser where the real nature of the agreement between them is that both shall be sureties for the acceptor.³

Co-trustee.—As to contribution between co-trustees in respect of liability for a breach of trust, see *Chillingworth v. Chambers*, [1896] 1 Ch. 685 C.A.; and *Robinson v. Harkin*, [1896] 2 Ch. 415.

Joint charge over several properties.—Where there is a decree charging a number of properties, the charge-holder can proceed to enforce his charge against any item of property he pleases, whether the charge be divisible or indivisible.⁴

1. *Whiting v. Burke* (1871), 6 Ch. App. 342. *Arcodeckne v. Howard*, (1875) 45 L.J. Ch. 622. *H. L. Craythorne v. Swinburne*, (1807) 14 Ves. 160, 161. *Cowell v. Edwards*, (1800) 2 Bos. & P. 268. *Turner v. Davies*, (1796) 2 Esp. 478. *Browne v. Lee*, (1827) 6 B. & C. 689. *Deering v. Winchelsea*, (1787) 2 Bos. & P. 270. *Kemp v. Finden*, (1844) 12 M. & W. 421. *Davies v. Humphreys*, (1840) 6 M. & W. 153, 168.

2. *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569 C.A. at p. 583.

3. *Reynolds v. Wheeler*, (1861) 10 C.B.N.S. 561. *Macdonald v. Whitfield*, (1883), 8 A.C. 733 P.C.

4. *Savitribai v. Radhakishan*, A.I.R. 1948 Nagpur 44.

A mortgagor part-sharer in a mortgage, or any person claiming title through him, may not redeem his share unless the mortgagee has acquired in whole or in part a share of the mortgaged property.¹

In *Motilal v. Samal Bechar*, (1930) 54 Bom. 625, the plaintiff was required to pay the whole of the mortgage debt before he could redeem a portion of the mortgaged property.

In *Kazim Alia v. Sadiq Ali and Fakhr Jahan v. Sadiq Ali*, (1938) 13 Luck. 494 P.C., a Shia Mahomedan died possessed of a taluqdari estate which would devolve on a single heir and also of a non-taluqdari property which would descend according to the ordinary principles of Mahomedan law of the Shia school. Both the taluqdari and non-taluqdari were held liable for his debts. It was held that there would be a ratable allocation of the debts as between the taluqdari and non-taluqdari property.

Partners and contribution.—Where partners are under a joint liability in respect of a particular contract arising out of and connected with the partnership, and a particular partner has been compelled to pay more than his share of such joint liability, the Court does not enforce his right of contribution in respect thereof against his co-partners. His right of contribution is however enforced in an action for a general partnership account.² No contribution is allowed by reason of the contract of partnership in respect of individual transactions ignoring the other partnership transactions.³

Where, however, two or more persons engage in a particular transaction which is distinct and separate from their partnership business, the Court will enforce the right of contribution.⁴ It will be a question of fact in each case as to whether a given liability is a partnership liability or an individual liability of any of the partners.⁵

Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in a default of assets, by the partners in proportion to their respective shares, unless, any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing.⁶

Section 43 applies as much to partners as to other co-contractors. A judgment against one partner is no bar to a subsequent suit on the contract or obligation against the other partners, so long as the debt is not extinguished,

1. *Shah Ram Chand v. Parbhu Dayal*, [1942] All. 608 P.C.

2. *Sedgwick v. Daniell*, (1857) 2 H. & N. 319. *Sadler v. Nixon*, (1834) 5 B. & Ad. 936. *Wilson v. Cutting*, (1834) 10 Bing. 436. *French v. Styring*, (1857) 2 C.B.N.S. 357. *Jagpati v. Sukhdeo*, A.I.R. 1942 Pat. 204. *Meyappa v. Palaniappa*, A.I.R. 1949 Mad. 109. *Manni Lal v. Narain Das*, A.I.R. 1946 Nag. 118. *Gopala Chetty v. Vijayaraghavachariar*, (1922) 45 Mad. 378: A.I.R. 1922 P.C. 115.

3. *Manni Lal v. Narain Das*, A.I.R. 1946 Nag. 118.

4. *Sedgwick v. Daniell*, (1857) 2 H. & N. 319.

5. *Jagpati v. Sukhdeo*, A.I.R. 1942 Pat. 204.

6. *Ram Chunder v. Manick Chunder*, (1881) 7 Cal. 428.

as the liability of partners is a joint and several one.¹

Where the original liability of the partners was a joint liability, a partner had no authority, without the consent of his partners, to change the joint liability of each partner, which was the ordinary incident of the partnership, into a joint and several liability.²

Joint promise as cause of action.—Whether the promise is made to several persons jointly or several persons join in making the promise, in either case there is only one debt or obligation, and performance made to or by one of the joint promisees or joint promisors discharges the contract altogether. Where one of the defendants sets up a defence which goes to the whole cause of action, the other joint promisors are entitled to the benefit of it, though they have not pleaded it.³ When judgment has been recovered in a court of record the original cause of action is merged in the judgment—*transit in rem judicatam*—and a second action cannot be brought in respect of the same cause of action.⁴ In the absence of statutory provisions to the contrary, an unsatisfied judgment of a foreign Court does not operate as a merger of the original cause of action.⁵

The rule as to joint liability has no application in cases where the liability of the debtors is several as well as joint. Section 43 of the Indian Contract Act, in the absence of a contrary intention appearing in the contract, makes all joint contracts joint and several in their incidents. In *Hemendro Coomar v. Rajendrolall*, (1878) 3 Cal. 353, it was held that a suit in which a decree had been obtained against one of several joint makers of a promissory note was a bar to a subsequent suit against the others. It was observed that the effect of Section 43 was not to create a joint and several liability in such a case.

Section 43 deprives a co-contractor sued alone of his right to have his co-contractors joined with him in the action. Section 233 gives to the party dealing with an agent who is personally liable a double form of election. He can choose between suing both principal and agent jointly or electing to sue one of them. If he sues one to judgment, a suit against the other is barred.⁶

The plaintiff had deposited certain sums of money with a “sabha” (caste organization) according to its resolution passed by the defendants at a meet-

1. In *re Vallabhai Adamji*, A I.R. 1933 Bom. 407.

2. *Lakshmishanker v. Vishnuram*, (1900) 24 Bom. 77.

3. *Pirie v. Richardson*, [1927] 1 K.B. 448 C.A.

4. *Bagot v. Williams*, (1824) 3 B. & C. 235. *Siddall v. Rawcliffe*, (1883) 1 Cr. & M. 487. *King v. Hoare*, (1844) 13 M. & W. 494. *Stewart v. Todd*, (1846) 9 Q.B. 767 Ex. Ch. *Re European Central Rail Co, Ex parte Oriental Financial Corpn.* (1876) 4 Ch. D. 33 C.A. *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338 C. A. *Aman v. Southern Rail Co.*, [1926] 1 K.B. 59 C.A. *Phani v. Rajendra*, [1946] 2 Cal. 605.

5. *Smith v. Nicolls*, (1839) 5 Bing. N.C. 208. *Bank of Australasia v. Harding*, (1850) 9 C.B. 661. *Bank of Australasia v. Nias*, (1851) 16 Q. B. 717. *Barber v. Lamb*, (1860) 8 C.B. N.S. 95. *Taylor v. Hollard*, [1902] 1 K.B. 676. *Kohnke v. Karger*, [1951] 2 K.B. 670, 675, 676: [1951] 2 All E.R. 179, 181.

6. *Shivlal Motilal v. Birdichand Jivraj*, (1917) 19 Bom. L.R. 370.

ing of the 'sabha'. The defendants had also promised to repay the deposits with interest on completion of the arbitration proceedings. On refusal to return the deposits, the plaintiff brought a suit for recovery of the same against the defendants personally and not against the 'sabha' as such. The promise by the defendants having been a joint promise, Section 43 was applicable to the case and the plaintiff in the absence of express agreement to the contrary could sue any one or more of the promisors to enforce the whole promise.¹

It is not incumbent on a person dealing with partners to make them all defendants in a suit.² Before a joint promisor can resist a suit on the ground that his co-sharer is not impleaded he must show that there was a definite contract that each promisor should not be separately liable.³ In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred.⁴ In a suit upon a contract made by a partner on behalf of the partnership the promisee can compel all or any one of such partners to perform the whole of the promise.⁵ In view of Section 43, it was not necessary to implead the defendant firm as a whole where only one partner signed a contract.⁶

Joint promise and individual suits.—When the promise is simply joint, as distinguished from joint and several, a judgment recovered against one or more of the several joint debtors bars an action against the others. Joint debtors, as distinguished from joint and several debtors, have the right to insist upon being sued together. The creditor by recovering a judgment against only one or more of the joint debtors disables himself from suing the rest of the joint debtors in separate actions. In the case of a joint promise, there being only one cause of action, the cause merges in the judgment previously obtained. The rule is however not so in cases of obligations that are joint and several.⁷

In England, too, exceptions have been grafted upon the general rule regarding the cause of action in a joint promise.⁸

Under the statutory provisions of Section 43, the joint liability of a contractor has been made a joint and several liability in its incidents. The *rationes decidendi* of the several cases falling under Section 43 have to be accepted accordingly.

1. *Balakrishna v. Balu*, A.I.R. 1949 Patna 184.

2. *Narayana v. Lakshmana*, (1898) 21 Mad. 256.

3. *Raghunath Das v. Baleswar Prasad*, (1928) 7 Pat. 353.

4. *Lukmidas Khimji v. Purshotam Haridas*, (1882) 6 Bom. 700.

5. *Md. Ismail v. Said-ud-din*, A.I.R. 1927 Lah. 819; (1928) 9 Lah. 217.

6. *Md. Ismail v. Saad-ud-Din*, (1928) 9 Lah. 217; A.I.R. 1927 Lah. 819.

7. *Blumfield's Case* (1596) 5 Co. Rep. 86b. *Higgen's Case* (1605) 6 Co. Rep. 44 b. *Ayrey v. Davenport*, (1807) 2 Bos. & P.N.R. 474. *Lechmere v. Fletcher*, (1833) 1 Cr. & M. 623. *King v. Hoare*, (1844) 13 M. & W. 494. *Re Davison. Ex parte Chandler* (1884), 13 Q.B.D. 50. *Blyth v. Fladgate*, [1891] 1 Ch. 337.

8. See Halsbury's Laws of England 3d ed., vol. 8, 1954, para 382.

A judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors.¹ In an action commenced against several joint debtors, the judgment recovered against one of them who admitted the claim did not bar the further prosecution of the suit against the others.² The omission in a previous suit against one of several joint promisors of a part of the cause of action was no bar under Section 43 of the Code of Civil Procedure, 1882, to a subsequent suit against another joint promisor for the portion so omitted.³

Joint promise and limitation.—An acknowledgment signed by one of the joint contractors saves the limitation as against himself though not against others. Other joint contractors cannot be chargeable on account of an acknowledgment made by one of them.⁴ One of several joint contractors cannot be chargeable by reason only of an acknowledgment signed by the other or others of them. Co-mortgagors come within the scope of the words "joint contractors".⁵

Where the mortgaged property has devolved on two heirs of the deceased mortgagor as tenants in common with equal shares in the mortgaged property their position in respect of the mortgage debt is that of joint contractors, and an acknowledgment in writing and signed by one of them will be sufficient to keep alive the debt as against him alone and not against the other. The mortgagee can therefore enforce the entire mortgage debt as against the half share of the acknowledging debtor even though the claim has become barred by time against the other debtor.⁶

In the case of a lease in favour of the joint family of *H* and his sons, the receipt of rents and profits by one of the sons was tantamount to a payment of interest, etc., to all the co-mortgagees in the given case within Section 20 of the Limitation Act, 1908.⁷ Now see Section 19 of the Limitation Act, 1963.

If a partnership has been dissolved and accounts have been wound up, the mutual rights and obligations of the partners therein being discharged, and an asset which has been forgotten or treated as valueless afterwards falls in, it ought to be divided between the partners in proportion to their shares in the partnership. But if no account has been taken, the proper remedy of a partner in respect of an asset so received is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it.⁸

The fact that the acceptor of a bill was not liable because he was joined

1. *Md. Askari v. Radhe Ram*, (1900) 22 All. 307.
2. *Dick v. Dhunji Jaitha*, (1901) 25 Bom. 378.
3. *Ramanjulu v. Aravamudu*, (1910) 33 Mad. 317.
4. *Gaya Prasad v. Babu Ram*, A.I.R. 1928 All. 387.
5. *Md. Taqi v. Raja Ram*, (F.B.) [1937] All. 272.
6. *Janardhanan v. Mariam*, A.I.R. 1957 Trav-Co. 186.
7. *Gaya Prasad v. Babu Ram*, A.I.R. 1928 All. 387.
8. *Gobala Chetty v. Vijayaraghavachariar*, (1922) 45 Mad. 378.

as a party to the suit after the period of limitation had expired did not discharge the drawer from his liability, where the suit had been instituted as against him in time.¹ The fact that the remedy against some of the defendants is barred by limitation does not relieve such defendants from their liability to contribute in case a decree is passed against others.²

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint contractor.

Release of one of several joint promisors.—In India, under the statutory provisions of Section 44 of the Indian Contract Act, 1872, in the case of a joint promise, the release of one or more of the joint promisors by the promisee does not result in the release of the rest of the joint promisors. In England, a release voluntarily given to one of a number of persons jointly or jointly and severally liable discharges the others.³ The creditor may however while granting the release in favour of one or a few, reserve his rights against the others; and in such a case the others are not discharged.⁴

Section 44 of the Indian Contract Act, 1872, is a clear departure from the English rule mentioned above. Sections 42 and 45 of the Contract Act do not recognize the rule of survivorship and respectively govern the devolution of joint rights and joint liabilities. Under Section 44, a release of one of joint promisors by the promisee does not discharge the other joint promisor or promisors.⁵ The position as regards joint judgment debtors is the same in principle as that as regards joint promisors under Section 41. Hence a release granted to one of them without the consent of the others does not absolve the latter from liability.⁶ Under the Indian Contract Act, 1872, joint liability implies joint and several liability. In view of the statutory provisions the release of one of several joint judgment-debtors does not affect the right of the decree-holder to proceed against the other judgment-debtors.⁷ The release of one of several joint

1. *Jambu Ramaswamy v. Sundararaja*, (1903) 26 Mad. 239.

2. *Gurcharan v. Ram Bharose*, A.I.R. 1943 Oudh 218.

3. *North v. Wakefield*, (1849) 13 Q.B. 536. *Re Hodgson, Beckett v. Ramsdale*, (1885) 31 Ch. D. 177 C.A. at p. 188. *Re Wolmershausen, Wolmershausen v. Wolmershausen*, (1890) 62 L.T. 541. *Cheetham v. Ward*, (1797) 1 Bos. & P. 630. *Nicholson v. Revill*, (1836) 4 Ad. & El. 675. *Re E.W.A.*, [1901] 2 K.B. 642.

4. *Ward v. National Bank of New Zealand*, (1883) 8 A.C. 755 P.C. *Duck v. Mayen*, [1892] 2 B. 511 C.A. *Rice v. Reed*, [1900] 1 Q.B. 54 C.A. at p. 67.

5. *Mahadeosingh v. Balmukund*, A.I.R. 1948 Nag. 279.

6. *Daulat Ram v. Punjab National Bank, Ltd.*, A.I.R. 1933 Lah. 505. *Mool Chand v. Alwar*, (1916) 39 Mad. 548.

7. *Chand Mall v. Ban Behari*, A.I.R. 1924 Cal. 209. *Kiam Ali v. Kayamaddi* (1880) 6 C.L.R. 212.

mortgagors with no express reservation of the mortgagee's remedy against the other mortgagors does not *ipso facto* release the other mortgagors.¹ A mortgagee has not only the right to release a part of the mortgaged security, but also one of the mortgagors, without imperilling his right to proceed against the remaining mortgagors and the rest of the property.² The release of part of the mortgaged property by the mortgagee does not take away as regards that part the liability to contribute which Section 82 of the Transfer of Property Act, 1882, imposes upon the different parts.³

In the absence of a custom or contract to the contrary between joint debtors who are jointly and severally liable to a creditor, each is not a surety to the other as defined by Section 126; nor do they occupy a position analogous to that of a surety strictly so-called so as to attract the provisions of Section 141.⁴

In *Hardas v. Ramguljarilal*, (F.B.), A.I.R. 1947 Nagpur 61, the facts were this: In a mortgage suit a preliminary decree was passed against 15 joint owners of the mortgaged property one of whom was *B* whose share in the mortgaged property was one-fifteenth. After the plaintiffs applied for a final decree, *B* alone made an application to the Debt Relief Court under C. P. and Berar Relief of Indebtedness Act, 1939, for determination of the debt, the other defendants being shown in the application as co-debtors; and the final decree proceedings were thereupon stayed. The Debt Relief Court scaled down the debt and *B* was allowed to pay the same in instalments. Thereafter the plaintiffs applied for the revival of the final decree proceedings and the question was whether the civil court had jurisdiction to do so despite the fact that the Debt Relief Court had framed a scheme for the payment of the debt. It was held that the integrity of the mortgage was not severed by reason of the order of the Debt Relief Court which was binding upon *B* and the plaintiffs.

The fact that *B* and his one-fifteenth share in the mortgage had been released from liability did not have the effect of releasing other defendants from liability in view of the application of Section 44. The proper course for the plaintiff was, therefore, to proceed against the rest of the defendants in respect of the whole debt and to throw the entire burden on to the remaining property.

Section 44 applies to liabilities arising out of the breach of a contract as well as to the performance of contracts. In a suit for damages against a partnership firm, the plaintiffs compromised the suit with one of the partners. He alone was released.⁵ When a partnership is determined by death, and the surviving partners continue to carry on the business, the Limitation Act is no bar to taking the accounts of the new partnership by going into the

1. *Krishna Charan v. Sanat Kumar*, (1917) 44 Cal. 162.

2. *Hardas v. Ramguljarilal*, (F.B.) [1947] Nag. 1 : A.I.R. 1947 Nag. 61.

3. *Ram Chand v. Parbhu Dayal*, A.I.R. 1942 P.C. 50.

4. *Vyavan v. Official Assignee, Madras*, (1932) 55 Mad. 949.

5. *Kirtes Chunder v. Struthers* (1879) 4 Cal. 336.

accounts of the old partnership which have been carried on into the new partnership without interruption on settlement.¹

Accord and satisfaction by one of the joint promisors.—Accord and satisfaction effected with one of several joint creditors discharges the joint debt.² Accord and satisfaction between the creditor and one of several debtors who are liable jointly or jointly and severally discharges in England the other debtors, unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them.³ Because accord and satisfaction is not merely an accord but also a satisfaction, there is no reason why the English rule as to accord and satisfaction should not apply to cases of joint and several liability under Section 43 of the Indian Contract Act.⁴ As to accord and satisfaction, see pages 628-631, *ante*. See also under Section 62, *post*.

Released joint promisor's liability.—When one or more of the joint promisors has or have been released by the promisee, his or their discharge holds good only as against the promisee alone. He or they are not, because of such release by the promisee, relieved of his or their obligation of contribution in favour of the performing joint promisor or promisors.⁵

Section 44 of the Indian Contract Act speaks of the *release* of one of the joint promisors by the promisee. Section 138 also speaks of release of one of the co-sureties by the creditor. Both in England and in India, a discharge of one of a number of joint debtors by operation of law does not release the others.⁶ In India, in a number of cases it has been held that even where one of the joint promisors has been released by operation of law from joint and several liability vis-a-vis the promisee, he remains liable for contribution to the performing promisors.⁷ It will be pertinent, therefore, to ask, should we make any distinction between a release by the promisee and that by an operation of the law in the matter of assessment of contribution between the promisors, *inter se*? That is to say, should a joint promisor discharged by operation of law be released from his liability of contribution in favour of the unreleased performing promisors?

In England, in estimating the amount of contribution to which a plaintiff was entitled the rule of law, as distinct from equity, was that regard must be had to the number of persons originally liable and not to the number actually

1. *Ahinsa Bibi v. Abdul Kader*, (1902) 25 Mad. 26.

2. *Wallace v. Kelsall*, (1840) 7 M. & W. 264. *Steeds v. Steeds*, (1889) 22 Q.B.D. 537. *Powell v. Brodhurst*, [1901] 2 Ch. 160.

3. *Nicholson v. Revill* (1836), 4 Ad. & El. 675. *Re E.W.A.*, [1901] 2 K.B. 642 C.A. *Re Garner's Motors Ltd.*, [1937] Ch. 594; [1937] 1 All E.R. 671.

4. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

5. *Mahadrosingh v. Balmukund*, A.I.R. 1948 Nag. 279. *Joy Chand v. Dole Gobinda*, A.I.R. 1944 Cal. 272.

6. *Re Garner's Motors, Ltd.*, [1937] Ch. 594; [1937] 1 All E.R. 671.

7. *Jankibai v. Rama* A.I.R. 1948 Nagpur 292; [1947] Nag. 881. *Kunju Naina v. Eapen Chacko*, A.I.R. 1954 T.C. 499.

liable and solvent at the time of payment.¹ But the rule of equity followed in England has always been that regard must be had to the number remaining liable and solvent at the time of payment.² After the Supreme Court of Judicature (Consolidation) Act, 1925, the equity rule now prevails in England. The defendant is not liable to any contribution until the amount actually due from him has been ascertained.³ Secondly, when the contract had been joint and several, the release of one joint promisor by operation of law cannot be viewed at par with a release by the promisee which release may be *mala fide* or tinged with fraud or collusion. Thirdly, when the intention of the present day Legislature has been to relieve the debtors in certain circumstances, and there has been a conflict between the common law of India and statute law, the statute law should prevail. Fourthly, in any case the Supreme Court of India should examine the position and give a conclusive opinion in the matter of the question as to whether a release of one joint debtor by operation of law should be viewed at par with a release of such promisor by the promisee in the matter of the released promisor's liability of contribution in favour of the unreleased and performing joint promisors.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees lent to him, by *B* and *C* promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with *C* during *C*'s life, and after the death of *C* with the representatives of *B* and *C* jointly.

Devolution of joint rights.—Where there are joint promisees, under Section 45 of the Indian Contract Act, the benefit of the promise devolves on the representatives of a deceased promisee. Thus the surviving promisee or promisees together with the representatives of the deceased joint promisee or promisees can jointly claim the performance of the promise. When all the original joint promisees die, their respective representatives are jointly entitled to claim its performance. *A*, in consideration of Rs. 5,000 lent to him by *B* and *C* promises *B* and *C* jointly to repay them that sum. *B* dies. The

1. *Balard v. Hawes* (1853), 2 E. & B. 287.

2. *Hitchman v. Stewart* (1855), 3 Drew. 271. *Love v. Dixon* (1885), 16 Q.B.D. 455. *Ramskill v. Edwards*, (1885) 31 Ch. D. 100.

3. *Sharpe v. Cummings*, (1844) 2 Dow. & L. 504. *Bates v. Townley*, (1848) 2 Exch. 152. *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. See Halsbury's Laws of England, 3d ed. 1954, para. 403.

right to claim performance rests with *B*'s representative or representatives jointly with *C* during *C*'s life; and after *C*'s death such right rests jointly with the respective representatives of *B* and *C*. By an express intention to the contrary the said statutory rule of devolution of joint rights is capable of being contracted out by the parties.

In England, in case of a joint promise on the death of one of several joint promisees the right of action on the promise rests by common law in the survivors of them.¹ Section 45 of the Indian Contract Act does not recognize the said English rule of survivorship and prescribes the rule of devolution of joint rights.²

Co-trustees are in a different position from joint promisees. Section 45 of the Contract Act has no application to such case.³ See Sections 44 and 43 of the Indian Trusts Act, 1882.

Realization of joint rights.—Where a promise is made to several persons jointly or the rights under a joint promise devolve on several persons jointly, the promisees or the surviving promisees and the representatives of the deceased promisees or the representatives of all the deceased promisees are entitled collectively to the performance of the joint promise. Proceedings to enforce the performance of such a promise can be taken only in the names of all the joint promisees or their representatives. The promise having been made to all the promisees jointly and to none of them separately, only one or a few of the promisees cannot sue to the exclusion of the other promisees. Where a joint promisee refuses to join as a plaintiff, he may be made a defendant. Where however a promise made to several persons jointly is required to be construed as being made also with each of the several promisees, as in the case of a contract under seal made in England after 1925, for example, the joint promise in its incidents becomes a joint and several promise; and, in the circumstances, each joint promisee will be entitled to bring an action on the promise without joining the other promisees or their representatives. This is, again, subject to an intention to the contrary as appearing from the contract as made by the parties.

Sections 42 and 45 of the Indian Contract Act prescribe respectively the devolution of joint liabilities and joint rights in a way different from the rule of survivorship of the English common law rule. Section 43 renders a joint promise a joint and several promise *qua* the promisors with all its attendant incidents. Section 45 while prescribing the rule of devolution of joint rights in a way different from the common law rule of survivorship is silent as to the nature of the respective rights of the promisees where their rights are joint and several *qua* promisees.

1. *Martin v. Crompe*, (1698) 1 Ld. Raym. 340; *Anderson v. Martinsdale*, (1801) 1 East 497; *Jell v. Douglas*, (1821) 4 B. & Ald. 374; *Attwood v. Rattenbury*, (1822) 6 Moore C.P. 579.

2. *Mahadeosingh v. Balmukund*, A.I.R. 1948 Nag. 279.

3. *Manikya v. Nalluri*, A.I.R. 1949 Mad. 654.

The genus of joint promise may comprise a number of cases. There may be a case where several persons as promisors bind themselves simply jointly to only one promisee. Or, several persons as promisors may bind themselves jointly and severally to only one promisee. In the absence of an express agreement to the contrary, the first mentioned case of joint promise *par excellence* will be rendered joint and several under the statutory provisions of Section 43 of the Indian Contract. Thirdly, a number of persons as promisors may bind themselves to a number of persons as joint promisees *par excellence*. In this third category of cases, in the absence of an express agreement to the contrary, the liability of the promisors is rendered joint and several under the impact of Section 43, but the promisees *qua* promisees retain their joint nature. Neither Section 43 nor Section 45 affects their joint nature. Section 43 does not speak of joint promisees at all. Section 45, again, only lays down rule of devolution of joint right or joints rights and nothing more. It can therefore be reasonably held that the mode of realization of a joint right so far as the joint promisees are concerned should be left to be governed by the English law on the subject, subject of course to the provisions of Section 45 of the Indian Contract Act and an express agreement to the contrary, where any. As we have seen above, several persons as promisors can bind themselves jointly and severally to several persons as promisees jointly and severally. This fourth category of cases should be distinguished from the third category, above mentioned, in that the promise in the fourth category is joint and several to the promisees *qua* promisees as opposed to the promise in the third category which is joint *par excellence qua* the promisees. Apart from the rule of devolution of a joint right, the Indian Contract is neutral so far as the realization of joint rights is concerned. Moreover, as seen before, Section 45 concerns only the statutory devolution of joint rights and not the nature of the rights of the several promisees where their rights have been joint and several *qua* promisees. The Court has therefore to scrutinize whether a given joint promise has been in its import joint *par excellence qua* the promisees or joint and several or only several in its incidents *qua* such promisees. The cases cited under Section 38, *ante*, as well as this Section should be viewed and reviewed accordingly. The Court should normally presume that in the absence of evidence to the contrary, a joint promise *qua* promisees is either joint or several *qua* the promisees and not both joint and several *qua* the promisees. Where the promisors bind themselves jointly and severally *qua* promisors but to the promisees severally *qua* promisees, the Court may presume or find the shares of the respective promisees on the basis or analogy of Section 45 of the Transfer of Property Act, 1882. When contract is simply a joint promise *qua* the promisees, then under Section 45 of the Indian Contract Act all the living joint promisees must joint in the suit to enforce a debt due to them; and an action brought by any number less than the full number of joint promisees is misconceived.¹ Where the lease discloses a joint demise or

1. *Vyankatesh Oil Mill & Co. v. Valmahomed*, A.I.R. 1928 Bom. 191.

contract, no one of the several lessors, with or without the consent of his co-lessors, can sue for an aliquot of the whole; the suit must be for the whole of the interest demised, else it fails.¹

Payment to one of joint promisees.—Whether the promise is made to several persons jointly or several persons join in making the promise, in either case there is only one debt or obligation, and performance made to or by one of the joint promisees or joint promisors discharges the contract altogether. A joint creditor in equity thus can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors.² In *Annapurnamma v. Akkayya*, (1913) 36 Mad. 544, it was held by the full bench (the Chief Justice *dissenting*) that one of several payees of a negotiable instrument could give a valid discharge of the entire debt without the concurrence of the other payees. For a discussion *see* under Section 38, *ante*.

In England, under the common law, a promise cannot be made to several persons both jointly and severally.³ But even in England, by statute, a promise may be deemed to be so made.

Under the Indian Contract Act, Sections 42-45, joint promises have been rendered joint and several promises for their incidents. This is, again, subject to the contrary intention as appearing from the contract. Each joint promisee may therefore bring an action on the promise without joining the other promisees, if the terms of the contract, whether implied or express, do not provide the contrary. It may be submitted that apart from the statutory provisions for devolution of joint rights and joint liabilities under Sections 42 and 45 respectively and the provisions for performance of a joint promise under Section 43, which, again, can be controlled by an intention of the parties to the contrary, the English common law rules or the English rules of equity may be held applicable also in Courts in India. Subject to this, the terms of a given joint contract whether they are implied or express should be decisive in the matter. Thus, in the absence of proof of agreement between two co-lessors that the rent paid shall be held by them jointly each being owner of the whole, or of a mutual grant of authority between them to receive the rent, the tenant by payment to one of the lessors is not discharged from his liability to pay the rent to the other; the other lessor is entitled to one-half of the rent, the shares being presumed to be equal in the absence of anything to show that they were unequal. Payment to one of two joint promisees is not a discharge of the entire debt. The payment in such cases will operate only as a valid discharge in respect of the payee's beneficial interest.⁴ On a devolution of a mortgagee's interest either on his legal

1. *Baraboni Coal Concern, Ltd. v. Gokulananda*, A.I.R. 1934 P.C. 58.

2. *Parbhu Ram v. Raghubir*, (1917) 42 I.C. 408.

3. *Slingsby's Case* (1587) 5 Co. Rep. 18b, Ex. Ch.; *Eccleston v. Clipsham*, (1668) 1 Saund. 153; *Withers v. Bircham*; (1824) 3 B. & C. 254; *Bradburns v. Botfield*, (1845) 14 M. & W. 559.

4. *Venkatasetty v. Rangasetty*, A.I.R. 1952 Mysore 68.

representatives or on his assignees, the legal representatives or co-assignees would be entitled to recover their own shares and be able to give an acquittance to that extent only, and not for the shares of other legal representatives or co-assignees.¹

In the case of the members of a joint family the effect of payment to one of them requires special consideration. If one of them happens to be the manager of the joint family, payment to him, as manager, may bind the other members. Even a junior member may sometimes be regarded as a person who as agent of others recovered money due to all of them as could be gathered from the fact that he was allowed to recover moneys due to the family of the creditors and was in effect treated as a joint-manager.²

In the case of a debt payable to the joint Hindu family payment to any member of the family other than the *karta* is not a valid discharge binding on the family. It is only a manager who can bind the family in such thing as the discharge of a debt. Where, therefore, a debtor pleaded that he had paid the amount to the son of the manager of the joint Hindu family but did not produce any evidence that the son had the authority from his father to receive it, it was held that the receipt given by the son did not operate as a valid discharge.³

Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all. The manager of a joint-family has, as such manager, the right to represent the family in suits. A suit by him as such manager on behalf of the joint-family will be maintainable without making the other members parties to the suit.⁴

For further cases see under Section 38, *ante*.

Joint promise and joinder of parties.—See under *Realization of joint rights* and *Payment to one of joint promisees*, *supra*. A few leading cases are cited below. As noted before, the *rationes decidendi* should however be viewed with reference to the implied or express terms of a given joint contract which terms have the effect of negating the statutory provisions, the common law principles, as well as the rules of equity.

For difference of opinion as to the effect of non-joinder of some heirs of a deceased tenant in a rent suit see *Kailash Chandra v. Brojendra*, (F.B.), A.I.R. 1925 Cal. 1056.

There is no equity, but often much injustice, in allowing one joint-contractor out of many to sue a defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor

1. *Bapanna v. Jaggiah*, A.I.R. 1939 Mad. 818.

2. *Venkatesetty v. Rangasetty*, A.I.R. 1952 Mysore 68.

3. *Dau v. Sensmal*, A.I.R. 1951 Raj. 11.

4. *Sheik Ibrahim v. Rama Aiyar*, (1912) 35 Mad. 685.

to recover under such circumstances, though he may no doubt, afterwards adjust the sum which he recovers with his co-contractors.¹

Under Section 45 of the Contract Act, it is not open to one of two or more joint promisees to sue alone either for performance of the promise in its entirety or to the extent of his share. If, however, a joint promisee declines to join as plaintiff or colludes with the defendant he can be impleaded as co-defendant and the suit will not then be defective.² Co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property.³

A, who with his three brothers composed a joint Hindu family, brought a suit in his own name to recover a joint debt. The suit as framed would not lie.⁴ The defendant was appointed as manager of an undivided Hindu family to which the plaintiff belonged. The plaintiff without joining the other members of his family sued the defendant for damages for breach of the contract of service. The suit was not maintainable.⁵ One or more of the several heirs of the original promisee, a single individual, cannot by himself or themselves institute a suit for specific performance of the contract of re-conveyance by making the remaining heirs as parties defendants to the suit. On the death of the original promisee, his heirs do not become themselves several joint promisees.⁶ Where one of the two joint promisees sues to enforce the claim for debt making the co-promisee defendant, the claim cannot be split up in the absence of facts to show that the co-promisee has abandoned his claim.⁷ If a suit is brought to recover a debt due to joint promisees, all of them must be impleaded and the suit must be for the entire debt. They are not entitled to split up their claim and each sue separately for his own share. A co-mortgagee is not bound by the action of another co-mortgagee.⁸

In *Rameshwar v. Ganga Bux*, A.I.R. 1950 All. 598, a full bench decision, it has been held that the provisions of Section 45 of the Contract Act apply to a mortgage contract. Therefore in a mortgage contract where several mortgagors borrow money from several mortgagees to whom they hypothecate their property as security for the debt borrowed, it is the manifest intention of the parties to the mortgage that the mortgagors, or any one of them, shall pay the entire mortgage debt to the mortgagees and in default that the entire mortgage debt will be realized by sale of the property and further that the mortgagees shall jointly be entitled to recover the mortgage debt from the mortgagors and not any one of them acting singly. A

1. *Ramsebuk v. Ramlall*, (1881) 6 Cal. 815; *Manghanmal v. Pahlajrai*, A.I.R. 1928 Sind. 16.

2. *Soorayya v. Kateeza Begum*, A.I.R. 1957 Andhra 688.

3. *Balkrishna Moreshwar v. Mahad Municipality*, (1886) 10 Bom. 32.

4. *Kalidas v. Nathu Bhagvan*: (1883) 7 Bom. 217.

5. *Alagappa v. Vellian*, (1895) 18 Mad. 33.

6. *Katip Bibi v. Fakir Chandra*, A.I.R. 1960 Cal. 187.

7. *Hira Lal v. Jadish*, A.I.R. 1959 Raj. 254.

8. *Arunachalam v. Ramasamy*, A.I.R. 1928 Mad. 933.

suit by one of the mortgagees is thus not maintainable either for the whole or for a part of the share in the mortgaged property. The principle of the indivisibility of the mortgage and the principle that all the joint promisees must combine to enforce the claim against the promisors applies. It is not possible to split up the mortgage and permit one of the mortgagees to enforce his claim either for the whole or for a part, nor is it possible for him as one of the joint promisees to enforce the claim without impleading his co-promisees either as plaintiffs or, in the case of their refusal, as defendants within the period of limitation.

A *hatchita* was executed by a person in favour of himself and three others who were having a money-lending business in which each had a definite share. Two of the three promisees filed a suit for their shares of the money due under the *hatchita* against the executant and the other promisee who refused to join with plaintiffs. The suit as framed was held maintainable.¹

When one of several partners in a firm sues in his own name to enforce performance of a contract entered into by the firm, he must, under the provisions of Section 45, implead the other partner or partners.² Ordinarily all the partners are necessary parties, but not the partner who has ceased to have interest.³

The Courts have become almost unanimous in observing that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the life time of the deceased partner.⁴ Similarly, it has been held that the representative of a deceased partner has the right to sue for the recovery of debts due to a firm in spite of the disapproval of the surviving partners.⁵ In *Ram Narain v. Ram Chunder*, (1891) 18 Cal. 86, it was however held that in a suit by surviving partners for the recovery of a partnership debt which had become due during the life of a deceased partner, the representatives of such deceased partner were necessary parties.

Order XXX, Rule 4, of the Code of Civil Procedure was enacted to set at rest the doubt that existed in connection with Section 45 of the Contract Act, and to provide that where two or more persons may sue in the name of the firm and any of such person dies, it shall not be necessary to join the legal representatives of the deceased partner, but it was not intended that a suit in a firm's name should be deemed to include the personal representatives of a deceased partner.⁶

1. *Nabendra v. Shasabindoo*, A.I.R. 1941 Cal. 595.

2. *Hari Singh v. Karam Chand*, (1927) 8 Lah. 1.

3. *Mulibai v. Shewaram*, A.I.R. 1926 Sind 78.

4. *Motilal Bechardass v. Ghellabhai Harlnam*, (1893) 17 Bom. 6; *Mool Chand v. Mul Chand*, (1923) 4 Lah. 142; *Vidyanatha v. Chinassamy*, (1894) 17 Mad. 108; *Debi Das v. Nirpat*, (1898) 20 All. 365; *Devshi v. Bhikamchand*, A.I.R. 1927 Bom. 125; *Ugar Sen v. Lakhmi Chand*, (1910) 32 All. 638; *Gobind Prasad v. Chandar Sekhar*, (1887) 9 All. 486; *Bal Kissen v. Kanya*, (1913) 17 C.L.J. 648.

5. *Aga Gulam Husain v. A. D. Sassoon*, (1897) 21 Bom. 412.

6. *Mathuradas Kanji v. Ebrahim Fazalbhoy*, (1927) 51 Bom. 986.

A partnership was dissolved by the death of one of the partners. The surviving partner sued the legal representatives of the deceased partner for the recovery of certain sums of money due to the partnership firm by the deceased partner. It was not maintainable. The defendants were entitled to have all the questions at issue determined by the taking of final accounts.¹ When, upon the death of the obligee of a money-bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.² Joint execution-creditors were not joint-creditors within the meaning of Section 8 of the Limitation Act, 1877.³ Interest from a fund settled on marriage of husband and wife was payable to both jointly. The husband died; his legal representative was entitled to his share.⁴

In *James Finlay & Co. v. St. John Demetrius*, A.I.R. 1957 Cal. 585, A addressed a letter to the Company requesting it that "as from date of receipt of this letter you will please note that my private account with you should be converted into a joint account in the name of myself and my wife payable to either or survivor. The account will be operated upon by either of us, and in the event of the death of either of us you will be entitled to make payment to the survivor of all moneys standing at the credit of the account." The letter was signed by A and in a corner of the letter the specimen signature of the wife appeared. The wife of A got a divorce and married another person. Subsequently, A requested the Company "to close my account and send me a cheque for the balance at my credit". But before the cheque sent by the Company could be encashed, A died. But before his death, A had made a will whereby he appointed an executor and directed that he should stand possessed of the residue of the estate after payment of just debts and funeral and testamentary expenses. Both the executor and the divorced wife of A made a demand of payment of the sum to the credit of A with the Company. In an inter-pleader suit filed by the Company it was held that the executor alone was entitled to receive the money and to apply it in due course of administration as directed by A. The money deposited with the Company was held to have belonged to A alone, the wife being a volunteer.

Time and place for Performance

- 46.** Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no time is specified and no application to be made.

Explanation.—The question "what is a reasonable time" is, in

1. *Ramaswami v. Muthukaruppan*, A.I.R. 1925 Mad. 737.
2. *Kandhiya Lal v. Chandar*, (F.B.) (1885) 7 All. 313.
3. *Periasami v. Krishna Ayyan*, (F.B.) (1902) 25 Mad. 431.
4. *Kanthu Punja v. Villamma*, (1902) 25 Mad. 385.

each particular case, a question of fact.

Time for performance where no application is to be made by the promisee and no time is specified.—Where by the contract, a contractor is to perform his promise without application by the contractee, and no time for performance has been specified in the contract itself, the engagement must be performed within a reasonable time.¹ Even though the time for the completion of a given contract was not specifically fixed, it would be the duty of the parties to complete it within a reasonable time.² Where time has not been expressly made of the essence of the contract, reasonable time will be of the essence of the contract; and if the contract is not performed within a reasonable time by any of the parties, the said party will be deemed to be guilty of breach of contract.³ An unnecessary delay enables the other party to put an end to the contract by giving a notice before its termination.⁴ Equity will not tolerate undue delay.⁵ See also *Mugneeram Bangur & Co. v. Gurbachan Singh*, A.I.R. 1965 S.C. 1523.

What is a reasonable time.—By way of abundant caution, the Legislature, by an *Explanation*, has explained that the question of what is a reasonable time is, in each particular case, a question of fact.⁶ The expression “payable when able” in a contractual agreement means legally speaking, payable within a reasonable time.⁷

“As soon as possible” means “within a reasonable time”.⁸ The reasonableness of the time will be judged having regard to the circumstances of the case.⁹ Where the goods were to be delivered “as soon as possible”, time in

1. *MacLaine v. Gatty*, [1921] 1 A.C. 376, H.L. Indian Sale of Goods Act, 1930, S. 36; *Moel Tryvan Ship Co. Ltd. v. Weir (Andrew) & Co.*, [1910] 2 K.B. 844 C.A. *Carlton S S Co. Ltd. v. Castle Mail Packets Co., Ltd.*, [1898] A. C. 486 H. L. *Hick v. Raymond & Reid.*, [1893] A.C. 22 H. L. *Castlegate S. S. Co. Ltd. v. Dempsey*, [1892] 1 Q.B. 854 C. A. *Postlethwaite v. Freeland*, (1880) 5 A.C. 599 H. L. *Ford v. Cotesworth*, (1870) L.R. 5 Q.B. 544 Ex. Ch. *De Waal v. Adler*, (1886) 12 A. C. 141 P. C. *Taylor v. Great Northern Rail Co.*, (1866) L.R. 1 C.P. 385; *St. Leonard's Shoreditch Vestry v. Hughes*, (1864) 17 C.B.N.S. 137; *Wigginton v. Dodd*, (1862) 2 F. & F. 844; *Braithwaite v. Crawshy*, (1850) 19 I.R.O.S. 81; *Sansom v. Rhodes*, (1840) 6 Bing. N.C. 261; *Hall v. Wright*, (1859) F.B. & E. 765, 781; *Potter v. Deboos*, (1815) 1 Stark. 82; Co. Litt. 208 a. b; *Lachhmi Newas v. Ram Das Ramniwas*, A.I.R. 1963 All. 110.

2. *Binda v. Kishori*, A.I.R. 1929 P.C. 195; *Hitkari Motors v. Attar Singh*, A.I.R. 1962 J. & K. 10; *Dorasinga v. Arunachalam*, (1900) 23 Mad. 441; *Managing Agents (Martin & Co.) v. Seth Deokinanda*, A.I.R. 1959 M.P. 276; *Kanshi Ram v. Baij Nath*, 98 I.C. 890; A.I.R. 1926 Journal 197(2).

3. *Sat Parkash v. Bodh Raj.*, A.I.R. 1958 Punj. 111.

4. *Alakhram v. Kulwantin Bai*, A.I.R. 1950 Nag. 238.

5. *Jamshed Khodaram v. Burjorji Dhunjibhai*, (1916) 40 Bom 289; A.I.R. 1915 P.C. 83.

6. *Bank of India v. Iamselji Chinoy and Chinoy & Co.*, (1949-50) 77 I.A. 76 P.C.; *Nelson v. Patrick*, (1846) 2 Car. and Kir. 641; *Managing Agents (Martin & Co.) v. Seth Deokinanda*, A.I.R. 1959 M.P. 276.

7. *Sohan Singh v. State Bank of India, Ltd.*, A.I.R. 1964 Punj. 123.

8. *Hydraulic Engg. Co. Ltd. v. McHaffie*, (1878) 4 Q.B.D. 670.

9. *Verelst's Administratrix v. Motor Union Insce. Co. Ltd.*, [1925] 2 K.B. 137. *Hyde v. Watts*, (1843) 12 M. & W. 254. *Staunton v. Wood*, (1851) 16 Q.B. 638. *Nelson v. Patrick*, (1846) 2 Car. & Kir. 641.

the sense of date-line was not of the essence of the contract.¹ "Immediately" is more stringent than "within a reasonable time".² So also "directly". "Directly" means speedily or as soon as practicable and not merely within a reasonable time.³ "Forthwith" may mean "within a reasonable time",⁴ or "within a particular period"⁵ as the facts of the case may justify. An offer open "up to Wednesday" ordinarily means that it remains open until midnight on Wednesday and does not expire at midnight on Tuesday.⁶

Application for performance.—No request, demand, or application for performance of a contract is necessary in order to create a right of action for breach of the contract unless such a request, demand, or application is expressly made a condition precedent in the contract itself or unless the nature of the contract requires that such a condition is to be implied for the due performance of the contract. Where goods were consigned for sale on commission, demand for an account was held necessary before an action could lie for not accounting.⁷ Where an undertaking was given to give a promissory note for composition of the debt of another, no demand for the note was necessary.⁸ In a contract to re-deliver goods in return for warrant of attorney, no demand was deemed necessary.⁹ In a contract to build a house within a reasonable time, there was no necessity for any requisition to build.¹⁰ A demand is not a condition precedent for payment of a debt.¹¹ Where however the amount of debt is uncertain, a demand is necessary.¹² In an undertaking to assign interest in particular premises, no demand for the assignment was necessary.¹³ In an undertaking to pay the debt of a third party against delivery of all securities held by the creditor, the delivery of such securities was a condition precedent to the payment of the debt.¹⁴

47. When a promise is to be performed on a certain day and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at

Time and place for performance of promise where time is specified and no application to be made.

1. *Mohanakrishnan v. Chimanlal & Co.*, A.I.R. 1960 Mad 452.
2. *Alexiadi v. Robinson*, (1861) 2 F. & F. 679.
3. *Duncan v. Topham*, (1849) 8 C.B. 225.
4. *Hyde v. Watts*, (1843) 12 M. & W. 254.
5. *Staunton v. Wood*, (1851) 16 Q.B. 638.
6. *Metropolitan Engg. Works v. Debrunner*, (1918) 45 Cal. 481.
7. *Topham v. Braddick*, (1809) 1 Taunt. 572.
8. *Brown v. Dean*, (1833) 5 B. & Ad. 848.
9. *Radford v. Smith*, (1838) 3 M. & W. 254.
10. *Fisher v. Ford*, (1840) 12 Ad. & El. 654.
11. *Walton v. Mascall*, (1844) 13 M. & W. 452. *Bell & Co. v. Antwerp, London & Brazil Line*, [1891] 1 Q.B. 103 C.A.
12. *Brown v. Great Eastern Rail. Co.*, (1877) 1 Q.B.D. 406.
13. *Lovelock v. Franklyn*, (1846) 8 Q.B. 371.
14. *Newgass v. Bottomley*, (1903) 19 T.L.R. 309.

which the promise ought to be performed.

Illustration

A promises to deliver goods at *B*'s warehouse on the first January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

Time of performance where time is specified but no application to be made by the promisee.—When a contract is to be performed on a particular day without any application by the promisee being required, the contractor may perform the contract on that particular day during the usual hours of business of the day. *A* promises to deliver goods at *B*'s warehouse on 1 January, 1966. *A* brings goods on the particular day to the warehouse but after the usual hour for closing it, and the goods are not received. *A* has failed to perform his contract. This rule is applicable where time is considered as being of the essence of a given contract. Even where time is of the essence of the contract, in an agreement allowing an option of repurchase, for example, equity gives relief where it was a default by the contractee such as rendered proper tender by the contractor by due date impracticable and when it was clear that the contractor was prepared with a ready, adequate, and willing tender.¹

Place of performance where time is specified but no application to be made.—Where time has been specified for the performance of a given contract but no place has been so specified and yet the contractor has not required the contractee to apply for its performance, the contractor must perform the contract at the place at which the contract ought to be performed. The place for performance of a contract, if not specified in express terms, depends upon the intention of the parties, as indicated by the nature and terms of the contract and the other circumstances of the particular case.²

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

Application for performance which is scheduled on a certain day.—When according to the contract, a promise is to be performed on a

1. *Maung Wala v. Maung Shwe Gon*, (1923) 1 Rang. 472.

2. *Reynolds v. Coleman*, (1887) 36 Ch. D. 453 C. A. *Thompson v. Palmer*, [1893] 2 Q.B. 80 C.A. *Mutzenbecher v. La Aseguradora Espanola*, [1906] 1 K.B. 254 C.A. *Comber v. Leyland*, [1898] A.C. 524 H.L. *Anger v. Vasmier*, (1902) 18 T.L.R. 596 C. A. *Bell & Co. v. Antwerp, London & Brazil Line*, [1891] 1 Q.B. 103 C.A. *Rein v. Stein*, [1892] 1 Q.B. 753. *Duval (Charles) & Co. Ltd. v. Gans*, [1904] 2 K.B. 685 C.A. *Drexel v. Drexel*, [1916] 1 Ch. 251. *Re Parana Plantations, Ltd.*, [1946] 2 All E.R. 214 C.A.

specified day and there has been no agreement that the promisor will perform his promise without application by the promisee it will be the duty of the promisee to apply for performance at a proper place and within the usual hours of business. The question of proper time and place is a question of fact.¹ Where two or more alternative places of performance have been specified in the contract, the party who has the right of selection of the place for performance has to notify the other party at which of the places he intends to perform or require performance of the contract.²

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of engagement where no application to be made and no place fixed.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Place for performance where no application is to be made by the promisee and no place is fixed for performance.—When an engagement is to be performed without application by the contractee and no place is fixed for the performance thereof, it is the duty of the contractor to apply to the contractee to appoint a reasonable place, for the performance of the engagement and to perform it at the appointed place. *A* undertakes to deliver a thousand metric tons of jute to *B* on 2 January, 1966, without any further terms. According to the statutory provisions of Section 49 of the Contract Act, *A* must apply to *B* for the latter to appoint a reasonable place for the purpose of receiving the delivery of the goods, and when a place has been so appointed by *B*, *A* must deliver the goods at the appointed place.

Where no place for performance has been specified either expressly or by implication from the nature, terms, or circumstances of the contract, and the engagement is such as requires the presence of both the parties for the performance, the rule is that the contractor will seek out the contractee and perform the engagement wherever the latter may be. This rule applies to cases where the performance of the engagement requires the concurrence of the contractee.³ Where employees of labour have a regular pay day and a regular office for making payment, wages are to be paid accordingly.⁴ Where the contractee has left the

1. *Startup v. Macdonald*, (1843) 6 Man. & G. 593 Ex. Ch. at pp. 624, 625.

2. *Ripplinghall v. Lloyd*, (1833) 5 B. & Ad. 742. *Thorn v. City Rice Mills*, (1889) 40 Ch. D. 357.

3. *Ripplinghall v. Lloyd*, (1833) 5 B. & Ad. 742. *Cranley v. Hillary*, (1813) 2 M. & S. 120. *State of Punjab v. A. K. Raha (Engineers) Ltd.*, A.I.R. 1964 Cal. 418.

4. *Riley v. Holland (William) & Sons, Ltd.*, [1911] 1 K.B. 1029, 1031 C.A.

country, the contractor need not follow him.¹

Section 49 determines the place of performance whether it be payment or any other mode of performance.² Section 49 comes into operation when there is to be an application by the promisor to the promisee and not *vice versa*.³ Section 49 can only apply when there is no place fixed for the performance of the contract and when the promise is to be performed without application of the promisee. Where the place is fixed for the performance of a contract either expressly or by implication, the rule mentioned in Section 49 can have no application.⁴

Section 49 does not get rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving, in the obligation to pay the creditor, the further obligation of finding the creditor so as to pay him. The rule in Section 49 is one which it was intended should apply both to the delivery of goods and to the payment of money. Where an intention was shown in the contract that payment should be made in Rangoon, a part of the contract was performable in Rangoon so as to satisfy Section 49.⁵ The general rule is that where no place of payment is specified either expressly or by implication, the debtor must seek the creditor.⁶ See *Munnisa Begum v. Noore Mohd.*, A.I.R. 1965 Andhra 231.

Section 49 does not preclude the application of the English common law rule that the debtor must seek out his creditor and pay his debt where the creditor happens to reside and does not get rid of the inferences which should justly be drawn from the terms of the contract itself or from the necessities of the case. In the first place, the terms of the contract should be looked at, and, if they do not help, the Court must have regard to the necessities of the case in deciding whether the rule should be applied.⁷

In the case of money kept in fixed deposit with a Bank, the place of repayment depends upon terms of the contract which is generally contained in the fixed deposit receipt. Any general rule that the debtor must seek the creditor which may be applicable to the case of a private money-lender

1. *Fessard v. Mugnier*, (1865) 18 C.B.N.S. 286.

2. *Puttappa v. Virabhadrappa*, (1905) 7 Bom. L.R. 993. *State of Punjab v. A. K. Raha.*, A.I.R. 1964 Cal. 418.

3. *Bharumal v. Sakhawainmal*, A.I.R. 1956 Bom. 111.

4. *Madan Lal v. Chawla Bank, Ltd.*, A.I.R. 1959 All. 612.

5. *Soniram Jeetmull v. Tata & Co.*, A.I.R. 1927 P.C. 156.

6. *Employees' State Insurance Corporation v. Ismail Sahib*, (F.B.) A.I.R. 1960 Mad. 64. *Motilal v. Surajmal*, (1906) 30 Bom. 167. *Mahalaxmi Bank Ltd. v. Chotanagpur Industrial and Commercial Association*, A.I.R. 1955 Cal. 413. *Nathubhai v. Chhabildas*, A.I.R. 1935 Bom. 283. *Annamalai v. Daw Hnin*, A.I.R. 1936 Rang. 251.

7. *Ramalinga v. Jayalakshmi*, A.I.R. 1941 Mad. 695. *Gopiram v. Shankar*, A.I.R. 1950 M.B. 72. *Employees' State Insurance Corpn. v. Ismail Sahib*, (F.B.) A.I.R. 1960 Mad. 64. *Bharumal v. Sakhawainmal*, A.I.R. 1956 Bom. 111. *Saibai v. Vishnibai*, A.I.R. 1953 Bom. 280. *Galley & Co. v. Appalaswami*, A.I.R. 1946 Mad. 300. *Venkatesha v. Kamlapat*, A.I.R. 1957 Mad. 201.

and a borrower, has no application to the case of a fixed depositor in a Bank which is a limited company.¹

Where the contract of lease does not fix a place for the payment of rent and the lessee does not apply to the lessor to fix a place for payment, under Section 49 of the Contract, the duty of the lessee is to pay the rent where the lessor is. The duty is not dependent on a demand being made by the lessor.²

Where the rent is reserved without any express covenant for payment and no place for payment is specified in the reservation it is payable on the demised premises.³

Where there is an express covenant providing for the place where the rent is to be paid, the rent has to be so paid.⁴ Before its repeal, Section 94 of the Indian Contract Act dealt with cases where there had been no special promise as to delivery and fixed the place of production as the place for delivery.⁵ In the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance.⁶ Where goods are sent *per V. P. P.*, the contract is intended to be performed at the place where the goods are to be received.⁷ The Sale of Goods Act, 1930, Section 35, lays down that apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. Under Section 36, *ibid.*, apart from any special contract, goods sold are to be delivered at the place at which they are at the time of the sale.

Where a seller takes goods to the buyer without any order from the latter and negotiates and effects a sale, it is presumed, in the absence of anything to the contrary, from the nature and circumstances of the transaction that the intention of the parties was that payment of the price should be made at the buyer's place. Therefore the suit by the seller at his place of business for the price is not maintainable. The suit has to be filed at the buyer's place of business.⁸

Negotiable instruments.—In *Jivatlal v. Lalbhai*, A.I.R. 1942 Bom. 251, it was observed that the words “on demand” in a promissory note only meant that the note was payable immediately or at the sight; and that the words “on demand” did not in themselves take the promissory note out of the terms of Section 49 of the Contract Act. In a number of cases, on the other hand, it has been held that performance under negotiable instruments is not governed by Section 49 of the Indian Contract Act. According to

1. *Mehtab v. Dharamrao*, A.I.R. 1944 Nagpur 330.
2. *Narayan v. Shankar*, A.I.R. 1955 Nag. 202. *Haldane v. Johnson*, (1853) 8 Exch. 689.
3. Co. Litt. 210. b. *Tinckler v. Prentice*, (1812) 4 Taunt. 549.
4. *Satibai v. Vishnibai*, A.I.R. 1953 Bom. 280.
5. *Grenon v. Lachmi Narain*, (1897) 24 Cal. 8 P.C.
6. *Dhunjisha Nusserwanji v. Fforde*, (1887) 11 Bom. 649.
7. *Mad. Esuff v. Hateem & Co.*, A.I.R. 1934 Mad. 581.
8. *Kadirsa v. Shanmugha*, A.I.R. 1960 Ker. 188.

these decisions Section 49 of the Contract Act can have no applicability to negotiable instruments because Section 70 of the Negotiable Instruments Act, 1881, itself lays down a rule as to the place of payment where the negotiable instrument does not specify it.¹ The rule that debtor must make payment where creditor resides or where his place of business is, is not applicable to negotiable instruments.² As to distinction between assignment of ordinary contract and of negotiable instruments see *Mohanlal v. Loan Company of Assam*, A.I.R. 1960 Assam 191.

Cause of action.—Performance of the contract being part of the cause of action, a suit in respect of its breach can be filed at the place where the contract should have been performed or its performance completed.³

The English common law rule that where there is no express agreement that payment is to be made at a particular place, a debtor must seek his creditor is not applicable in India, as a matter of law, to determine the forum where the suit is to be instituted. The creditor's place of residence or business is only one of the circumstances attending the contract which may be taken into consideration in finding as a fact the place where the money was agreed to be paid.⁴

Section 49 has no application to a pronote which is payable on demand and is silent as to the place of repayment. Consequently, *a fortiori*, the common law rule applies and it being necessary for the debtor to seek out his creditor and pay him in the absence of any agreed place for payment, the place for re-payment must be deemed to be the place where the creditor resides, and therefore a Court at that place has jurisdiction to entertain the suit on the pronote. A suit on a contract can be instituted in the Court which has the territorial jurisdiction over the place where the contract has to be performed and that the place of performance must be taken to be the place where the plaintiff is residing, on the principle that when the creditor is residing in the realm, the debtor must follow the creditor and pay him, unless there is a different contract between them, and that Section 49 of the Contract Act does not get rid of inferences that should justly be drawn from the terms of the contract itself and the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay. Section 49 applies in such a case because the promise has to be performed without application by the promisee. Where, however, the promise is to be performed on demand, Section 49 has no application.⁵

1. *Sahni v. State of Madhya Bharat*, (F.B.) A.I.R. 1954 M.B. 184. *Subba Narayana v. Ramaswami*, (F.B.) 30 Mad. 88. *Srilal v. Anant Lal*, A.I.R. 1940 Cal. 443.

2. *Horsburgh v. Chandroji*, A.I.R. 1957 M.B. 90. *Gopikisan v. Jethmal*, A.I.R. 1935 Nag. 144. *Dalsukh Nathmal v. Motilal*, A.I.R. 1938 Nag. 262. *Piyara v. Bhagwan*, A.I.R. 1951 Punj. 33.

3. *Champaklal v. Nectar Tea Co.*, (1933) 57 Bom. 306.

4. *Hira Lal v. Baij Nath*, (F.B.) A.I.R. 1960 Punj. 450.

5. *Srilal v. Anant Lal*, A.I.R. 1940 Cal. 443. *Jagadish v. Santimayer*, A.I.R. 1961 Cal. 321. *Hira Lal v. Baij Nath*, (F.B.) A.I.R. 1960 Punj. 450.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Performance in manner or at time prescribed or sanctioned by promisee.

Illustrations

(a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C* a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B* respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2,000 rupees. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as *C* puts into the post a letter containing the note duly addressed to *A*.

Manner of performance.—Sections 48 and 49 indicate that the mode of performance of a given contract is a question of fact in a particular case. When the manner and place of repayment of the money are not the subject of an express contract, the Court will gather what by necessary implication, having regard to the nature of the contract and the circumstances under which it was entered into, the parties must have meant.¹ The contractor is not entitled to substitute for what he has contracted for something else which is equally advantageous to the contractee.² Where one of the things contracted for subsequently becomes impossible, it is a question of construction of the terms of the contract whether the contractor is bound to perform the rest or is discharged altogether.³ Where money is due to a person from another, the liability to pay the money can be discharged only by repaying it in cash unless the parties expressly agree to some other mode of discharging that liability.⁴ A debtor has to seek out his creditor. See *Munnisa Begum v. Noore Mohd.*, A.I.R. 1965 Andhra 231.

As it has been observed in *Narayandas v. Sangli Bank, Ltd.*, A.I.R. 1966 S.C. 170, 174, to support a plea of payment, it is not necessary to show that cash passed. Payment may be made by means of transfer entries in books of account.

Performance in manner prescribed by promisee.—A contract will be discharged by being performed in the manner prescribed by the contractee.⁵

1. *Mehlab v. Dharamrao*, A.I.R. 1944 Nag. 330.

2. *Lagh v. Lillie*, (1860) 6 H. & N. 165. *Forman & Co. v. The Liddesdale*, [1900] A. C. 190 P. C. Re Sutro (L.) & Co. and Heilbut, Symons and Co. [1917] 2 K. B. 348 C.A. See however *Havens v. Middleton*, (1853) 10 Hare 641.

3. *Anderson v. Commercial Union Assurance Co.*, (1885) 55 L.J.Q.B. 146, 150 C.A. See Section 56, *post*.

4. *Sheikh Hasanoo v. Natesa Mudliar*, A.I.R. 1959 Bom. 267.

5. *Hairoon Bibi v. United India Life Insurance Co. Ltd.*, A.I.R. 1947 Mad. 122.

B owes *A* Rs. 2,000. *A* desires *B* to pay the amount to *A*'s account with Pallai Central Bank, Ltd. *B*, who also is a constituent of the said Bank, orders the amount to be transferred from his account to *A*'s credit, and this is done by the Bank. Later, and before *A* knows of the transfer, Pallai Central Bank, Ltd. fails. *B*'s contract is discharged. *B* owes *A* Rs. 100. *A* desires *B* to send him a note for Rs. 100 by post in full discharge of his debt. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.¹ Had the note been posted as a conditional payment and not received by *A* or the amount not realized on the basis thereof the original contract would remain undischarged.

As between the sender and the addressee it is the request of the addressee that a letter or cheque be sent by post that makes the post office the agent of the addressee. When there is no such request, express or implied, then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself. Thus, where a cheque is posted by the debtor in pursuance of the request of the creditor, he performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance.² The contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promisee. Under the Indian Post Office Act, 1898, the right of the sender to reclaim the letter or the cheque until it is delivered to the addressee is by no means an absolute right, for it is left entirely to the postal authorities to decide whether a letter or cheque once posted should be returned to the sender.³ In the absence of any agreement between the parties entitling the tenant to send the rent by money order, the lessee cannot send the rent by money order and debit the charges to the lessor.⁴ Where a subscriber to the Railway Provident Fund desired payment of his deposit in the Provident Fund in Stirling and also desired that remittance be made to him by a bank draft in a named bank in England, the only legal method of such remittance was to send the amount to the Reserve Bank of India for payment to the bank in England.⁵

Performance in manner sanctioned by promisee.—When the manner of performance of a given promise was not prescribed at the time of its formation, but later the promisee or the mutual promisees sanctioned its performance in a particular manner, and then if the contract or mutual contract has been performed in the manner sanctioned, the contract or the mutual contract stands discharged.⁶ *Ghosh* and *Raha* are mutually indeb-

1. *Commissioner of Income-Tax, Bombay South v. Ogale Glass Works, Ltd.*, A.I.R. 1954 S.C. 429. *Thorappa v. Umedmalji*, A.I.R. 1924 Bom. 205. *Indian Cotton Co. v. Hari Poonjoo*, [1937] Bom. 763 : A.I.R. 1937 Bom. 39.

2. *Union of India v. Lallan Prasad*, A.I.R. 1963 Patna 216.

3. *Commissioner of Income-Tax, Bombay South v. Ogale Glass Works, Ltd.*, A.I.R. 1954 S.C. 429.

4. *Narayan v. Shankar*, A.I.R. 1955 Nag. 202.

5. *Union of India v. Kashi Prasad*, A.I.R. 1962 Cal. 169.

6. *Hairoo Bibi v. United India Life Insurance Co. Ltd.*, A.I.R. 1947 Mad. 122.

ted. They settle an account by setting off one item against another, and *Ghosh* pays the balance found to be due from him upon such settlement. This amounts to a payment by *Ghosh* and *Raha* respectively of the sums they owed to each other. *A* owes *B* Rs. 2,000. *B* accepts some of *A*'s goods in deduction of the debt. The delivery of the goods by *A* operates as a part payment of the debt. The acceptance of the performance of the contract of repayment of the debt in the manner sanctioned by *B* results in the *pro tanto* discharge of the contract.

Where from the previous conduct of the parties, it is evident that sending premium by money order was one of the approved or sanctioned methods of payment, the obligation of the party who is to make the payment shall be deemed to have been discharged if the money order was sent on or before the relevant date.¹

Performance at time prescribed by promisee.—Where at the time of the formation of a given contract, the time of its performance was not prescribed but later on it was prescribed by the promisee, then its performance at the prescribed time discharges the contract. In *Shiv Dayal v. Union of India*, A.I.R. 1963 Punjab 538, the contract was to be completed within ten months of commencement. The date of commencement was to be when order to commence the work would be given. The date of commencement was however arbitrarily fixed. The contract was held as to have been illegally rescinded.

Performance at time sanctioned by promisee.—When no time was specified for the performance of a given contract but it was performed at a time sanctioned by the promisee, the contract is discharged.

Statutory prohibition and performance.—Statutory prohibitions are not subject to common law exception of executed contracts and therefore a contract though executed must be deemed to be void on the ground of failure to comply with statutory provisions relating to the manner in which it shall be made.²

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

Illustrations

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

A need not pay for the goods unless *A* is ready and willing to pay for the goods on delivery.

1. *Krishnan v. Kerala Gilt Edged Security Life Assurance Co. Ltd.*, A.I.R. 1952 T.C. 181.

2. *Bhumho Metharam v. District Local Board*, A.I.R. 1940 Sind 199.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Promisor and reciprocal promisee.—In case of reciprocal promises to be performed simultaneously, a promisor cannot be required to perform his part unless the other side is also ready and willing to perform his. *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery. Delivery of the goods and payment of the price being reciprocal promises to be performed simultaneously, *A* need not deliver the goods unless *B* is ready and willing to pay for them then and there on delivery. Similarly, *B* will not be required to pay unless *A* is ready and willing to deliver the goods on payment. See Section 32 of the Sale of Goods Act, 1930. *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment being payable on delivery. *A* need not deliver the goods unless *B* is ready and willing to pay the first instalment on delivery thereof. *B* again, need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Where a contract consists of reciprocal or mutual promises and such promises are so dependent on each other as to constitute concurrent conditions, the effect of the contract is to bind each party to be ready and willing to perform his promise on a tender of performance by the other party.

Readiness and willingness to perform include ability to perform. In a suit by the buyer for damages for breach of a contract for sale of goods it is incumbent upon him to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the goods or that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. Therefore where the buyer is proved to have been in a state of acute financial embarrassment on the date of delivery and could not have paid for the goods bought if the seller had delivered them to him, the buyer cannot be said to have been ready and willing to carry out his part of the contract and therefore the seller is absolved from his liability under the contract.¹ Goods may not be in plaintiff's actual possession on the agreed date of delivery. It is sufficient if he had control over sufficient quantity of goods.²

Where under the contract, payment has to be made against delivery they consist of reciprocal promises to be simultaneously performed. In respect of such contract if the plaintiff is the buyer he must allege and

1. *Jagannath v. Aaron & Co.*, A.I.R. 1940 Rang. 284. *Shriram Rupram v. Madangopal Gowardhan*, (1903) 30 Cal. 865 P.C. *Chengarvelu & Chitty v. Venkanna & Sons*, A.I.R. 1925 Mad. 971. *Ganesh Das v. Ram Nath*, (1928) 9 Lah. 148 : A.I.R. 1928 Lah. 20. *Dina Nath v. Maha Vir*, A.I.R. 1958 Punj 289.

2. *Kanwar Bhan v. Ganpat Rai*, (1926) 7 Lah. 442 : A.I.R. 1926 Lah. 318.

prove that he was ready and willing to pay for the goods.¹ In the absence of an averment in the defendants' pleadings to the contrary, the plaintiffs' readiness and willingness to perform their part of the contract must be implied.²

In order to prove himself ready and willing to perform his obligation under a contract to purchase shares, a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact.³ Whether the plaintiffs had, under Section 51, done sufficient to entitle them to recover damages without showing that they made an actual tender of the money is a question of fact.⁴

The plaintiff under a contract was to take delivery of the goods on a certain date. He filed an application for insolvency before that date. The interim receiver who was appointed in the insolvency proceedings also did not act immediately or even within a reasonable time to adopt the contract of the plaintiff. The insolvency of the plaintiff was equivalent to a notice by the insolvent that he did not intend to perform his obligation. The conduct of the plaintiff and the interim receiver entitled the defendants to treat the contract as abandoned by the plaintiff. Inordinate delay in such cases may well be taken to be evidence of the abandonment of the contract, dispensing with express rescission by notice or agreement.⁵

Reciprocal promises contained in an agreement may not be always inherently capable of simultaneous performance within the terms of Section 51 of the Contract Act. In such cases, one party's right may be dependant on and postponed to, his performing what he on his part had promised.⁶

In *Brahma Swaroop v. Diwan Chand*, A.I.R. 1963 Cal. 583, the award provided that the appellant was under the obligation to make the payment in the first instance. The subsidiary obligation of the respondent to deliver the shares would arise only on tender of payment of the aforesaid sum.

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Order of performance of reciprocal promises.

Illustrations

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A*'s promise to build the house must be performed before *B*'s promise to pay for it.

1. *Alapati Krishnamurthi v. Seetharamayya*, A.I.R. 1958 Andhra 427.
2. *Kanwar Bhan v. Ganpat Rai*, (1926) 7 Lah. 442; A.I.R. 1926 Lah. 318.
3. *Bank of India v. Jamssetji Chinoy and Chinoy and Co.*, A.I.R. 1950 P.C. 90.
4. *Shriram Rupram v. Madangopal Gowardhan*, (1903) 30 Cal. 865 P.C.
5. *Pulgaon Cotton Mills Ltd. v. Gulabai*, A.I.R. 1953 Nag. 345.
6. *Floris Edridge v. Rustumji Danjibhoy*, A.I.R. 1933 P.C. 233; (1934) 58 Bom. 101 P.C.

(b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A*'s promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

Order of performance of reciprocal promises.—In case of reciprocal promises the order of performance of the respective promises may be fixed by the terms of the contract itself or it may not. If the order be fixed, the promises have to be performed accordingly.¹ If it is not so fixed, the respective promises are required to be performed in an order which the nature of the transaction requires. *A* and *B* contract that *A* shall build a house for *B* at an agreed price. *A* must build the house before he can demand payment for the construction. *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A* need not make over his stock-in-trade until *B* gives the security. The nature of the transaction requires that *A* should have the security before he delivers up the stock.

Where promises are reciprocal and there is no order of performance either contractual or natural, each party has always the option to perform his part of the contract but one party cannot insist on the other party performing his promise without himself performing what he has agreed to.²

In a contract for the sale of goods, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, and neither party can maintain an action for breach of contract without averring that he performed or offered to perform what he himself was bound to do.³ In the absence of a special contract to the contrary, the payment of the consideration is to be simultaneous with the execution of the deed of conveyance.⁴

Where the lessee has not performed his part of the contract under the contract for lease, it does not lie in his mouth to say that the lessor committed a breach.⁵

Where in an engagement there has been a promise to do one of two or more things, and the contract does not specify which of the parties would have the option of selection, the rule is that the party who has to perform the first act has the right to elect which branch of the alternative promise he will perform.⁶

1. *Edridge v. Sethna*, (1934) 58 Bom. 101 P.C. : A.I.R. 1933 P.C. 233.

2. *Vairavan v. Kannappa*, A.I.R. 1925 Mad. 1029.

3. *Chengravelu & Sons v. Akarapu & Sons*, I.C. 299. See also Section 32 of the Indian Sale of Goods Act, 1930.

4. *Nanik Lal v. Shankar Lal*, A.I.R. 1962 Cal. 103.

5. *Anant Bharthi v. Sarup Singh*, A.I.R. 1928 All. 360.

6. *Layton v. Pearce*, (1778) 1 Doug. K.B. 15; *Dann v. Spurrier*, (1803) 3 Bos. & P. 399; *Price v. Nixon*, (1814) 5 Taunt. 338; *Chippendale v. Thurston*, (1829) 4 C. & P. 98; *Re Brookman's Trust*, (1869) 5 Ch. App. 182; *Reed v. Kilburn Co-op. Society*, (1875) L.R. 10 Q.B. 264; *Tielens v. Hooper*, (1850) 5 Exch. 830; *Christie v. Wilson*, (1915) S.C. 645; *Mallam v. Arden*, (1833) 10 Bing. 299; *Vyse v. Wakefield* (1840) 6 M. & W. 442, *affd.* 7 M. & W.

Whether two given promises are reciprocal or not is a question of construction.¹

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented, and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Liability of party preventing event on which contract is to take effect.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*; if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

Prevention of performance by reciprocal promisee.—When a contract consists in two reciprocal promises, and one of the reciprocal promisees prevents the other promisee-promisor from performing the latter's part, the contract becomes voidable at the option of the party so prevented, and the prevented promisee-promisor is entitled to compensation from the party preventing for any loss which the prevented party may have sustained in consequence of the non-performance of the contract. *A* and *B* contract that *B* shall execute certain work for *A* for Rs. 1,000. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. Because *B* is prevented from doing his part, the contract becomes voidable at his option; and if he elects to rescind the contract, he will be entitled to recover compensation from *A* for any loss which he may have incurred because of the non-performance of the contract.

Where the contract consists of mutual promises there is an obligation on each party to perform his own promise and to accept performance of the other's promise. Where an engagement consists of reciprocal promises and such promises are dependent on each other, that is to say, the due performance by one party of his promise is a condition precedent to the liability of the other party to perform his promise, the non-performance of the promise which is a condition precedent releases the other party from his obligation to perform the contract, unless he has received a substantial part of the consideration for his promise, in which case he can only recover damages for breach of the other's promise.²

126. *Ex. Ch. Calaminus v. Dowlais Iron Co.*, (1878) 47 L.J.Q.B. 575; *Honck v. Muller* (1881) 7 Q.B.D. 92 C.A. *Thorn v. City Rice Mills*, (1889) 40 Ch. D. 357; *Schneider v. Foster*, (1857) 2 H. & N. 4; *Brown v. Royal Insurance Co.*, (1859) 1 E. & E. 853; *Rugg v. Weir*, (1864) 16 C.B.N.S. 471; *Guth v. Lees*, (1865) 3 H. & C. 558.

1. *Brahma Swaroop v. Diwan Chand*, A.I.R. 1963 Cal. 583.

2. *Bryant v. Beattie*, (1838) 5 Scott. 751. *Ellen v. Topp*, (1851) 6 Exch. 424. *White v. Beeton*, (1861) 7 H. & N. 42. *Pust v. Dowie*, (1865) 5 B. & S. 33. *Behn v. Burness*, (1863) 3 B. & S. 751. *Ex. Ch. Chartor v. Scargill*, (1875) L.R. 10 Q.B. 564. *Combe v. Green*,

A wrongful repudiation by one party cannot, except by the election of the other party so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *brutum fulmen*, that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent.¹

Prevention by one party is constructively tantamount to fulfilment by the other. Under Section 53 two alternative reliefs are vouchsafed to the party prevented. One is to enforce the contract specifically, and the other is to claim compensation by rescinding, annulling, or abandoning the entire contract.²

A wrongful repudiation of a contract by one of the parties does not enable the other party to sue to enforce the promise to him therein contained without having performed a reciprocal promise which by the contract, construed according to Section 52 of the Contract Act, was to be performed before the promise which he seeks to enforce; it is not sufficient that the plaintiff was always ready and willing to perform the condition precedent, and the Court cannot give him a decree subject to his doing so. The other party can treat the repudiation as determining the contract and claim damages under Section 53 of the Act; if he does not take that course the repudiation does not affect the rights and liabilities of the parties.³

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound

(1843) 11 M. & W. 480. *General Billposting Co. Ltd. v. Atkinson*, (1909) A.C. 118 H.L. *Loakey v. Lucas*, (1843) 14 C.B.N.S. 491. *Meyrick v. Dyson*, (1925) 41 T.L.R. 368.

1. *Floris Edridge v. Rustomji Danibhoy*, A.I.R. 1933 P.C. 233: (1134) 58 Bom 101 P.C.

2. *Nagayya v. Bapamma*, A.I.R. 1958 Andhra 504.

3. *Edridge v. Sethna*, (1934) 58 Bom. 101 P.C.: A.I.R. 1953 P.C. 233.

to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A*'s promise to deliver need not be performed, and *B* must make compensation.

(d) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B*'s promise to pay need not be performed, and *A* must make compensation.

Non-performance of the first performable reciprocal promise.—

Where in case of reciprocal promises, the nature of the transaction requires that one of the said promises has to be first performed or according to the term of the contract the said promise was to be first performed, or the nature of the said promise was such that the counter-promise could not be performed without the prior performance of the first, and the promisor of the first-mentioned reciprocal promise does not perform it, he as the promisee cannot claim performance of the other reciprocal promise and at the same time will be liable to make compensation to the other party to the contract for any loss which the latter may have sustained because of the non-performance of the contract.

A hires *B*'s ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B*'s promise and has further to make compensation to *B* for the loss which *B* may have sustained because of the non-performance of the contract. *A* contracts with *B* to execute certain builder's work for a fixed price *B* supplying the scaffolding and timber necessary for the work. *B* however refuses to furnish any scaffolding and timber, with the result that the work can not be executed. *A* need not execute the work. *B*, moreover, is required to make compensation to *A* for any loss caused to the latter because of the non-performance of the contract. *A* contracts with *B* to deliver to the latter at an agreed price certain merchandise on board a ship which cannot arrive for a month, *B* engaging to pay for the goods within a week from the date of the contract. *B* does not pay within the stipulated time. *A* need not deliver the goods, but *B* must make compensation to *A*. *A* promises to sell to *B* one hundred bales of merchandise to be delivered next day, *B* promising to *A* to pay for the goods within a month. *A* does not deliver the goods according to his promise. *B* need not pay, and yet *A* must make compensation to *B*.

Where a contract consists of reciprocal or mutual promises and such promises are independent of each other, each party is bound in any event to perform his part of the contract, because the due performance by one party of his own promise is not a condition precedent to the liability of the other party to perform his. The so-called mutual promises being independent of each other, the breach of one of them gives the other party a right of action for damages alone, whereas in the case of dependent promises, the non-

performance of a promise would release the other party from his own obligation to perform the contract.

The question whether the mutual promises are dependent or independent of each other depends upon the engagement taken as a whole and is to be decided by the intention of the parties as appearing from the terms of the contract and the surrounding circumstances.¹ The question whether a promise constitutes a condition precedent when it depends on the construction of a written agreement is one of law for the Court.² Where the particular stipulation goes to the root of the matter the promises are dependent,³ and where it only partially affects it and it may be compensated for in damages, the promises are independent.⁴

The plaintiffs, a firm at Madras booked orders for goods of the defendants who were the manufacturers of those goods and were carrying on their business at Mirzapur. The contract was for despatch of goods *f.o.r.* Mirzapur, at earliest booking day. The defendants failed to despatch goods even after many reminders of the plaintiffs on the excuse that railway booking was not open. It was in evidence that other merchants of Mirzapur had booked their goods. The plaintiffs cancelled the contract, covered up the contract by purchasing goods in the market and sued in Madras for the difference in prices as damages. It was held that the contract was rightly cancelled and the defendant was liable in damages.⁵

The mortgagee failed to perform his part of the contract. The mortgagor was entitled to rescind his promise as well as to claim redemption before the stipulated period.⁶ The mortgagor mortgaged the property for a fixed period of 15 years in consideration of the mortgagee paying a decree-holder, who had a charge on the mortgaged property, certain instalments regularly. There was a covenant that in the event of the decree-holder proceeding to bring the property to sale and selling it the mortgagee would be entitled to recall the whole of the mortgage-money due to him. After paying some of the instalments, the mortgagee made default and the mortgagor, after satisfying the decree-holder, sued to redeem the mortgage. Held, that it was open to the

1. *Bettini v. Gye*, (1876) 1 Q.B.D. 183. *Bastin v. Bidwell*, (1881) 18 Ch. D. 238. *Benston v. Taylor, Sons & Co.*, (2) [1893] 2 Q.B. 274, 281 C.A. *Kidston & Co. v. Monceau Ironworks Co.*, [1902] 86 L.T. 556. *Roberts v. Brett*, (1865) 11 H.L. Cas. 337. *Bank of China, Japan and the Straits v. American Trading Co.* [1894] A.C. 266 P.C. *Kidner v. Stimpson*, (1918) 35 T.L.R. 63 C.A. *Huntoon Co. v. Kolynos*, [1930] 1 Ch. 528, 557 C.A. *Luis de Ridder Limitada v. Andre and Cie*, [1941] 1 All E.R. 380.

2. *Emery (George D.) Co. v. Wells*, [1906] A.C. 515 P.C.

3. *Poussard v. Spiers and Pond*, (1876) 1 Q.B.D. 410. *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*, (1884) 9 A.C. 434, 443 H. L. *London Guarantee & Accident Co. v. Farnley*, (1880) 5 A.C. 911 H.L.

4. *Bettini v. Gye*, (1876) 1 Q.B.D. 183. *Hosking v. Pahang Corpn.* (1891) 8 T.L.R. 125 C.A. *Pennsylvania Shipping Co. v. Compagnie Nationale De Navigation*, [1939] 2 All E.R. 1167. *Boon v. Eyre*, (1779) 1 Hy. Bl. 273, *N. Ellen v. Topp*, (1851) 6 Exch. 424. *Graves v. Legg*, (1854) 9 Exch. 709.

5. *Hanuman Prasad v. Nanjappa*, A.I.R. 1949 Mad 858.

6. *Sanwaley v. Shoo Sarup*, (1927) 2 Luck. 279 : A.I.R. 1927 Oudh 12.

mortgagor to ignore the condition of 15 years and to seek redemption at once. When the mortgagee failed to perform his part of the contract, it followed that the mortgagor was also entitled to rescind his promise as well and to recover possession of the mortgaged property under the provisions of Sections 39 and 54 of the Contract Act, and Section 24(2) of the Specific Relief Act, 1877, without waiting for the expiry of 15 years.¹ Licence was necessary to give effect to an agreement for permission to quarry. Non-renewal of the licence absolved the defendant of the monthly sum payable.²

A mortgage cannot be split. It has to be redeemed as a whole or not at all. Where a property is sold and a part of the consideration is left with the vendee to pay off a mortgage executed by the vendor, even if the vendor fails at the time of the sale to put the vendee in possession of a very small proportion of the vended property, still the vendee would not be entitled, either in equity or upon the actual terms of the contract, to refuse to redeem the mortgage, or to leave an unpaid amount thereof proportionate to the extent of his failure to get possession.³

Partial performance of a condition precedent is not sufficient. Where however the contract is divisible and it consists in effect of two or more separate transactions, the fact that a condition precedent has not been wholly performed does not relieve the other party to the contract from his own liability to perform that part of the contract in respect of which the condition precedent has been satisfied.⁴ The performance of the first performable promise of the reciprocal promises is excused where the other party has prevented its performance.⁵ The maker of the first performable promise is excused also where the other party has done something which puts it out of the latter's power to perform his own promise. The maker of the first promise is also excused when the other party has intimated that the latter does not intend to perform his own part.⁶ When promiser fails to perform his part of the contract, the promisee can rescind the whole contract; but if the promisee treat it as a subsisting contract, he must

1. *Sanwaley v. Sheo Sarup*, (1927) 2 Luck. 279 : A.I.R. 1927 Oudh 12.

2. *Goculdas Madhavji v. Narsu Yenkujji*, (1889) 13 Bom. 630.

3. *Jado Prasad v. Jamuna Prasad*, A.I.R. 1946 Panna 263.

4. *Wilson v. London, Italian and Adriatic Steam Navigation Co.*, (1865) L.R. 1 C.P. 61.
Wilkinson v. Clements, (1872) 8 Ch. App. 96.

5. *Eisen v. M'Cabe, Ltd.*, (1920) 57 Sc. L.R. 534 H. L. *Kleinert v. Abosso Gold Mining Co. Ltd.*, (1913) 58 Sol. Jo. 45 P.C. *Dodd v. Churton*, (1897) 1 Q.B. 562 C.A. *Hayward v. Bennet* (1846) 3 C.B. 404. *Thomas v. Fredricks*, (1847) 10 Q.B. 775. *Prickett v. Badger*, (1856) 1 C.B.N.S. 296. *Fisher v. Drewett*, (1878) 89 L.J. Q.B. 32 C.A. *Mackay v. Dick*, (1881) 6 A.C. 251 H. L. *Bradley v. Benjamin*, (1877) 46 L.J. Q.B. 590. *Cort v. Ambergate, etc., Rail Co.*, (1851) 17 Q.B. 127.

6. *British and Bnningtons v. N. W Cachur Tea Co.*, (1923) A.C. 48 H. L. *Braithwaite v. Forrign Hardwood Co.*; (1905) 2 K.B. 543 C.A. *Ripley v. M'Clure* (1849) 4 Exch. 345. *Lovelock v. Franklyn*, (1846) 8 Q.B. 371. *Caines v. Smith*, (1846) 15 M. & W. 189. *Short v. Stone*, (1846) 8 Q.B. 358. *Pontifex v. Wilkison*, (1845) 1 C.B. 75. *Planche v. Colburn*, (1831) 8 Bing. 14. *Hotham v. East-India Co.*, (1787) 1 Term. Rep. 638. *Jonas v. Barkley*, (1781) 2 Doug. 2 K.B. 684. *Maine's Case* (1596) 5 Co. Rep. 20b.

do his part fully to entitle him to insist on the promisor's carrying out the contract.¹

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time in contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Effect of acceptance of performance at time other than that agreed upon.

Time whether of the essence of contract.—"Time of the essence of the contract", means, that the time agreed for the performance of a stipulation must be strictly observed. At English common law this was always the rule; but in equity—as regards such contracts as those for the sale of realty, as distinguished from mercantile contracts—time is only of the essence of the contract in cases of direct stipulation, or of necessary implication.² Where time has been of the essence of the agreement, the condition must be complied with.³ Stipulations in contracts as to time or otherwise in the eye of the law have much affinity with penalty clauses.⁴ It cannot, however, be said that time can never be made essential in equity. Though normally equity tends to regard the insertion of a time as formal and not essential, yet there

1. *Burn and Co. v. Lakhdirji*, A.I.R. 1925 P.C. 188.

2. *Reuter v. Sala*, (1879) 4 C.P.D. 239; *Parkin v. Thorold*, 22 L.J. Ch. 170; *Oakden v. Pike* 34 L.J. Ch. 620.

3. *Burjerji Shapurji v. Madhavlal Jesingbhai*, (1934) 58 Bom. 610.

4. Section 25 (7) of the Judicature Act, 1873. Section 10 of the (English) Sale of Goods Act, 1893.

are cases in which equity is fully alive to the vital importance of the time element in a contract.¹

Time though not made of the essence of the contract by a stipulation in the original contract can be made so by engrafting it by notice.² The phrase "time of the essence" is also relevant in connection with conditions in wills³ as well as in the execution of charitable trusts.⁴

Under the English Common Law, in the absence of an intention to the contrary, time is deemed essential for the performance of a contract even though the parties did not expressly make any provision as to that.⁵ In India the Courts have followed the English precedents. Generally, where time is specified in a contract it should be performed within the time so specified; otherwise, within a reasonable time.⁶ Time is deemed essential for the performance of a contract in the absence of an intention to the contrary. But exceptions have been so many that it is often said that apart from exceptions, the ordinary presumption is that time is not of the essence of the contract.⁷

In the absence of a contrary intention, stipulations as to time of payment are not of the essence of a contract of sale.⁸ Stipulations as to the time for delivery of goods are considered essential unless a contrary intention is shown.⁹ Where the Railway Administration entered into contracts with the plaintiff for the supply of food grains needed for the consumption of the railway staff, the contracts as such were not held as mercantile contracts and therefore time was not of the essence.¹⁰

In suits for specific performance, however, the Courts have taken a comparatively lenient view on the question of time. In a contract for the sale of land, for example, the Court will decree specific performance even though the plaintiff could not observe the time fixed for the completion of the con-

1. Hansbury, *Modern Equity*, 8th ed., 1962, 85; *Sachindra v. G. P. & Co.*, A.I.R. 1964 Orissa 269.

2. *Taylor v. Brown*, (1839) 2 Beav. 180, 183 (per Lord Langdale). *King v. Wilson*, (1843) 6 Beav. 124, 126 (per Lord Langdale). *Pegg v. Wisden*, (1852) 16 Beav. 239, 244 (per Romilly, M.R.). *Wells v. Maxwell*, (1864) 33 L.J. Ch. 44, 50 (Per Knight Bruce, L.J.). *Green v. Sevin*, (1879) 13 Ch. D. 589 (per Fry, J.)

3. *Re Packard* [1920] 1 Ch. 596; *Re Goodwin* [1924] 2 Ch. 26 *Re Goldsmith* [1947] Ch. 339.

4. *Re Selinger's Will Trusts* [1959] 1 W.L.R. 217.

5. *Parkin v. Thorold*, (1852), 16 Beav. 59; *Bowes v. Shand*, (1877) 2 App. Cas. 455; *Reuter v. Sala*, (1879) 4 C.P.D. 239; *Sharp v. Christmas*, (1892), 8 T.L.R. 687; *Hartley v. Hyman*, [1920] 3 K. B. 475, 484. *Noble v. Edwardes*, (1877) 7 Ch. D. 378 C.A. *Wilde v. Fort*, (1812) 4 Taunt. 334. *Sansom v. Rhodes*, (1840) 6 Bing. N.C. 261.

6. *Hutakari Motors v. Attar Singh*, A.I.R. 1962 J. & K. 10.

7. *Subramania v. Annamapet Co-operative Society*, A.I.R. 1961 Mad. 289. *Lucknow Automobiles v. Replacement Parts Co.*, A.I.R. 1940 Oudh 443. *Lal Singh v. Tejmal*, A.I.R. 1960 Ajmer 75. *Dominion of India v. Bhikharaj* A.I.R. 1957 Patna 586.

8. English Sale of Goods Act, 1893, S. 10 (1), Sale of Goods Act, 1930, S. 11. *Thames Sack and Bag Co. Ltd. v. Knowles and Co. Ltd.*, (1918) 88 L.J.K.B. 585.

9. *Bowes v. Shand*, (1877) 2 A.C. 455 *H. L. Reuter v. Sala*, (1879) 4 C.P.D. 239 C.A.

10. *Dominion of India v. Bhikharaj*, A.I.R. 1957 Patna 586.

tract. This rule of leniency, in case of contract for the sale of land, for example, is, again, subject to the exigencies of the contract in question. Thus the rule that time is not of the essence of the contract of sale of land or building has not been allowed any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as non-essential term of the contract.¹

In *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, (1916) 40 Bom. 289 P.C. : A.I.R. 1915 P.C. 83, it has been observed that Section 55 of the Indian Contract Act lays down the principle which obtains under the law of England as regards contracts to sell land. Under that law, equity, which governs the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But such stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. See also *Palanichani v. Gomathinayagam*, A.I.R. 1966 Mad. 46.

The general rule of equity is that if a thing is agreed upon to be done though there is a penalty annexed to secure its performance, yet the very thing itself must be done, and consequently the plaintiff could claim to have the contract of sale specifically enforced, there being no condition that the vendees should abandon their rights and accept a certain sum of money in lieu thereof.²

In contracts for the sale of land, equity has established the rule that unless expressly made so by the terms of the contract or by the special circumstan-

1. *Newman v. Rogers*, [1793] 4 Bro. C.C. 391. *Parkin v. Thorold*, (1852), 16 Beav. 59; *Hudson v. Temple*, (1860), 29 Beav. 536; *Stickney v. Keeble*, [1915] A.C. 386, 416 H.L.; *Hartley v. Hymans*, [1920] 3 K.B. 475, 595; *Richards (Charles), Ltd. v. Oppenheim*, [1950] 1 K.B. 616; [1950] 1 All E.R. 198. *Seton v. Slade*, (1802) 7 Ves. 265. *Radcliffe v. Warrington*, (1806) 12 ves. 326. *Boehm v. Wood*, (1820) 1 Jac. & W. 419. *Hipwell v. Knight*, (1835) 1 Y. & C. Ex. 401. *Nokes v. Kilmorey*, (1847) 1 De G. & Sm. 444. *Roberts v. Berry*, (1853) 3 De G. M. & G. 284. *Tilley v. Thomas*, (1867) 3 Ch. App. 61. *Webb v. Hughes*, (1870) L.R. 10 Eq. 281. *Teju Kaya & Co. v. Gangji Nensey & Co.* (1933) 57 Bom. 292. *Smith v. Hamilton*, [1951] Ch. 174; [1950] 2 All E.R. 928. *Shamjibhai v. Hanchand*, A.I.R. 1952 Nag. 220. *Krishna v. Rangulam*, A.I.R. 1958 M.P. 295. *Kumaraswamy v. Joseph* (F.B.) A.I.R. 1950 T.G. 61. *Dhirajlal Ullasmati*, A.I.R. 1952 Samashtra 88. *Chiranjil Lal v. Jisuk Ram*, A.I.R. 1953 Orissa 105. *Bhagwat Narain v. Srinivas*, (F.B.) A.I.R. 1937 Patna 113.

2. *Sadig Hussain v. Anup Singh*, (1923) 4 Lah. 327.

ces, time is not essential. Under the law, equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.¹ Specific performance of a contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be done between the parties, and if nothing in the express stipulation of the parties, the nature of the property, or the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in an unmistakable language.² A person was to get a sale deed executed by another within a certain time. The deed was not executed but it was not due to any default on the part of such person. As time was not the essence of the contract, the person was not debarred from asking the other party subsequently to execute it.³

In the case of a contract for the sale of a house, the circumstances that the house was required for the personal residence of the purchaser and he wanted vacant possession, that a period was specified within which vacant possession was to be given, that the purchaser had given on previous occasion one extension and that liquidated damages had been settled upon in case of default are not sufficient to make time as the essence of the contract. A Court has to see the contract as it was entered into and the subsequent conduct of the parties is not relevant to find out whether the time was of the essence of the contract.⁴

Thus, though ordinarily time is not of the essence of a contract to sell land or other immovable property,⁵ yet it is open to the party to make time of the essence of the contract.⁶ Ordinarily in all contracts for sale of immovable property time is not of the essence of the contract unless circumstances show otherwise.⁷ The circumstance that the price of the land was rising cannot

1. *Chandee v. Katial*, A.I.R. 1964 S.C. 915; *Sachindra v. G. P. & Co.*, A.I.R. 1964 Orissa 269; *Bal Saroop v. Lakhbir Singh*, A.I.R. 1964 Punj. 375.

2. *Dhirajlal v. Ullasmati*, A.I.R. 1952 Saurashtra 88; *Bhagwat Singh v. Hari Kishen*, A.I.R. 1942 Oudh 1; *Badruddin v. Tufail Ahmed*, A.I.R. 1963 M.P. 31.

3. *Bhagwat Singh v. Hari Kishen*, A.I.R. 1942 Oudh 1.

4. *Madan Mohan v. Jawala Prashad*, A.I.R. 1950 E.P. 278.

5. *Jamshed Khodaram v. Burjorji Dhunji bhai*, (1916) 40 Bom. 289 P.C. *Mohammad Wazir v. Jahangiri Mal*, A.I.R. 1949 Lah. 72; *Subayya v. Garikapati*, A.I.R. 1957 Andhra 307; *Krishna v. Ramgulam*, A.I.R. 1958 M.P. 295.

6. *Suryanarayanamurthi v. Satanarayanamurthi*, A.I.R. 1925 Mad. 211; *Subayya v. Garikapati*, A.I.R. 1957 Andhra 307; *Kunaraswamy v. Joseph*, (F.B.) A.I.R. 1950 T.C. 61; *Pazhaniappa v. South Indian Planting and Industrial Co. Ltd.*, A.I.R. 1953 T.C. 151; *Bhagwat Narain v. Srinivas*, (F.B.) A.I.R. 1937 Patna 113. *Sachindra v. G. P. & Co.*, A.I.R. 1964 Orissa 269.

7. *Amba Lal v. Harish Chander*, A.I.R. 1955 Punj. 189; *Subedar v. Madho*, A.I.R. 1953 All. 529; *Sreedhara v. Thanumalayan*, A.I.R. 1953 T.C. 90; *Pazhaniappa v. South Indian Planting and Industrial Co. Ltd.*, A.I.R. 1953 T.C. 161.

be a ground for holding that time was of the essence of the contract.¹

Equity looks to the intent, rather than to the form. In determining whether time was of the essence of a given contract, courts look at the substance of the contract and not at the letter.² Time will be of the essence of the contract if it is so provided specifically.³ That is to say, even where the parties named a specific time within which completion was to take place, the Court will see whether notwithstanding the said stipulation as to time, the parties really and in substance intended more than that the performance of the contract should take place within a reasonable time.⁴

Time is of the essence of a contract whenever it appears to have been the real intention of the parties that it should be so and not where it was merely inserted as a formal part of the contract. The intention, of course, may be either expressed or implied.⁵ Whether time was of the essence of the contract is a question of the intention of the parties to be gathered from the terms of the contract.⁶

The mere insertion of a term in a contract that a certain act shall be done within a particular period would not necessarily indicate that time was of the essence of the contract. The intention to make time an essence of the contract must be expressed in unmistakable language. This intention must be deduced from the words of a contract, from the surrounding circumstances at the time that the contract was entered into and from the subject-matter of the contract.⁷ The ascertainment of that intention is a question of law.⁸ P.W.D. contracts are no exception.⁹

Except in commercial contracts, the presumption is that time is not of the essence of the contract. This presumption can, however, be rebutted by showing the intention of the parties to the contrary. Such intention has to be ascertained, from the contract itself and may also be inferred by what passed between the parties prior to the contract.

Where the evidence showed that the vendor was extremely pressed for money and he made it an express term of the contract to sell the property that a sum of Rs. 4,000 out of the total consideration of Rs. 9,000 should

1. *Amba Lal v. Harish Chander*, A.I.R. 1955 Punj. 189.

2. *Bhura Mal v. Gokul Narain*, (1952) 2 Raj. 1; *Kamu v. Gonda*, A.I.R. 1947 Lah. 352; *Dhirajlal v. Ullasmati*, A.I.R. 1952 Saurashtra 88; *Amarnath v. Mohan Singh*, A.I.R. 1954 M.B. 134; *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254; *Rayadurai v. Muthuswami*, A.I.R. 1962 Mad. 489.

3. *Sat Prakash v. Bodh Raj*, A.I.R. 1958 Punj. 111.

4. *Kamu v. Gonda*, A.I.R. 1947 Lah. 352; *Amarnath v. Mohan Singh*, A.I.R. 1954 M.B. 134; *Sadiq Hussain v. Anup Singh*, (1923) 4 Lah. 327; *Khuda-I-Tala v. Hamida*, A.I.R. 1945 All. 70; *Dominion of India v. Bhikhranj*, A.I.R. 1957 Patna 586.

5. *Kunjumohammad v. Goverdhan*, A.I.R. 1956 T.C. 93; *Bhagwat Narain v. Srinivas*, (F.B.) A.I.R. 1937 Patna 113.

6. *Shambhulal v. Secretary of State*, A.I.R. 1940 Sind 1; *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254.

7. *Ram Kalpe v. Kasi Nath*, A.I.R. 1950 Cal. 582.

8. *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254.

9. *Shambhulal v. Secretary of State*, 1940 Sind 1.

be deposited with him before a certain hour on the third day after the contract and that the sale deed was to be executed within one month of the date of the agreement, it was held that in the instant case time was intended to be of the essence of the contract.¹

In mercantile contracts stipulations as to time are regarded, *prima facie*, as essential.² Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.³ In the case of mercantile contracts and when the rates were daily fluctuating the time prescribed is to be treated as of the essence of the contract.⁴ When both parties are engaged in business and they make contracts for sale and purchase of articles for business purposes and not for private consumption, the contracts fall within the category of mercantile contracts.⁵

An option for the purchase or repurchase of property has to be exercised strictly within the time limited.⁶ An option for the renewal of a lease has likewise to be exercised in time.⁷ Where a notice has been given in time of an intention to exercise the option but it has been given without authority, such notice cannot be made affective by a ratification after the time limited for the exercise of the option has expired.⁸ An agreement to transfer land in discharge of a debt not being a contract for the sale of land, if not fulfilled within a reasonable time, may be repudiated by the creditor without serving any notice upon the debtor.⁹ This is so because time was of the essence of the contract.

Normally in the case of contracts to sell immovable property, time is not of the essence of the contract and specific performance can be compelled if a tender is made within a reasonable time. Cases of agreements to recovery however stand on a different footing because they amount to concession. In such cases the contract must be performed within the stipulated period. In the case of a contract of reconveyance there is no mutuality. Only the vendor is given a concession to purchase the property

1. *Bhalchandra v. Mahadeo*, A.I.R. 1947 Nagpur 193.

2. *Reuter v. Sala*, (1879) 4 C.P.D. 239, 249 C.A. *Sharp v. Christmas* (1892) 8 T.L.R. 687, 688 C.A. *Hikari Motors v. Attar Singh*, A.I.R. 1962 J. & K. 10. *Lucknow Automobiles v. Replacement Parts Co.*, A.I.R. 1940 Oudh 413. *Dominion of India v. Bhikhranj*, A.I.R. 1957 Patna 586.

3. *Bhudar v. Betts*, (1915) 22 C.L.J. 566.

4. *Madina Rice Mills v. Sampangirmiah*, A.I.R. 1953 Mys. 66. *Shamjibhai v. Hemchand*, A.I.R. 1952 Nag. 220. *Dominion of India v. Bhikhranj*, A.I.R. 1957 Patna 586.

5. *Dominion of India v. Bhikhranj*, A.I.R. 1957 Patna 586. *Lucknow Automobiles v. Replacement Part Co.*, A.I.R. 1940 Oudh 443.

6. *Dibbins v. Dibbins*, (1896) 2 Ch. 348. *Ranelagh v. Melton*, (1864) 2 Drew. & Sm. 278. *Samarapuri v. Sudarsanachariar*, (1919) 42 Mad. 802. *Maung Wala v. Maung Shwe Gon*, (1923) 1 Rang. 472. *Balasundara v. Muthuvenkatachala*, A.I.R. 1954 Mad. 799. *Phukan v. Sahjadi*, A.I.R. 1954 Assam 54. *Protap v. Kali Charan*, A.I.R. 1952 Cal. 32. *Shriram v. Rambilas*, A.I.R. 1947 Nag 208.

7. *Nicholson v. Smith*, (1882) 22 Ch. D. 640.

8. *Dibbins v. Dibbins*, (1896) 2 Ch. 348.

9. *Simpson v. Connolly*, (1953) 2 All E.R. 474.

within a specific period, if he pays the necessary amount, and there is no corresponding right in the vendee. The uncertainty in the title of the vendee which is introduced by the indulgence shown by him to the vendor must be set at rest after the stipulated period expires.¹ In a contract for sale, time may be considered as being of the essence of the contract in particular circumstances.² In cases of compromise time is sometimes of the essence of the contract.³

In a suit for specific performance of contract by *A* against *B*, the parties came to a compromise, and the suit was decreed in favour of *A* on such compromise. It was the term of compromise that *A* was to pay certain amount to *B* by a certain date and if he paid the amount within the time *B* was to execute a deed of reconveyance. *A* did not pay the amount within time but deposited the amount in Court two days later. It was held that in the instant case time was of the essence of the contract.⁴ A consent-decree passed in terms of a compromise provided that the defendant should pay a sum of money and build a new wall within two months. Time was of the essence of the instant contract.⁵ In *Duraikannoo v. Saravana*, A.I.R. 1963 Mad. 468, the conditions of auction were not the root of the conditions of auction sale, and time was of the essence of the contract.

Some English cases on time whether of the essence of contract.—

In *Reuter v. Sala*, (1879) 4 C.P.D. 239, the plaintiffs contracted to sell to the defendants 25 tons (more or less) Penang pepper, October/November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared 25 tons by a vessel called the *B.*, only 20 tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper. Held, that the contract was entire, and that the defendants were not bound to accept the 20 tons but were entitled to insist upon the delivery of 25 tons according to the contract.⁶

In *Steedman v. Drinkle*, [1916] 1 A.C. 275 P.C.,⁷ the parties having made time of the essence of the agreement, specific performance could not be decreed, but it was held that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms. In *In re Dagenham (Thames) Dock Co. Hulse, ex p.* (1873) L.R. 8 Ch. 1022, 1025, the impugned clause was held as having been merely in the nature of a penalty, and so the vendors had no right to recover possession of the land if the balance of the purchase-money was paid.

1. *Krishna v. Ramgulam*, A.I.R. 1958 M.P. 295.
2. *Burn & Co. v. Lukhdirji*, A.I.R. 1925 P.C. 188.
3. *Kishen Prasad v. Kunj Behari*, A.I.R. 1926 All. 278.
4. *Beni Singh v. Sew Sah*, A.I.R. 1949 Cal. 661.
5. *Shankar Saktharam v. Ratanji Premji*, 47 Bom. 607.
6. *Per Cotton and Thesiger*, L.J.J.; Brett, L.J., dissenting.
7. On appeal from the Supreme Court of Saskatchewan.

In *Clydebank Engineering and Shipbuilding Co. Ltd. v. Don Jose Y Castaneda*, [1905] A.C. 6 H.L. (Sc.), the sum of £500 a week was regarded as liquidated damages and not as a penalty; and the payment in full of the price of the vessels without reservation was no waiver of the claim for damages for delay in delivery. In *Mussen v. Van Diemen's Land Co.*, [1938] Ch. 253, the retention by the defendants of the £40,200 was held as not having been in the nature of a penalty, and in view of the terms of Clause 12 of the agreement it was not unconscionable on the part of the defendants to retain the £40,200. In *Stockloser v. Johnson*, [1954] 1 Q.B. 476 C.A., it was observed by Somervell and Denning, L.J.J., that the court had jurisdiction to relieve against forfeiture of instalments after rescission if in the actual circumstances of the case it would be unconscionable for the vendor to retain the instalments. Romer, L.J., observed that after rescission the Court had no jurisdiction to grant relief in the absence of fraud, or sharp practice or other unconscionable conduct. The insistence by a vendor, whose conduct was not open to criticism in other respects, upon his contractual right to retain instalments of purchase money already paid did not, in itself, constitute unconscionable conduct.

In *Coslake v. Till* (1826), 1 Russ. 376, one of the terms of the contract was that possession of the public-house should be taken, and the money paid on a given day, time being of the essence of the contract. The purchaser not in a condition to fulfil his part of the contract on that day could not compel a specific performance though he was ready on the following day to have proceeded to complete the purchase. In *Cowles v. Gale* (1871), L.R. 7 Ch. 12, it was held that upon the sale of a public-house as a going concern time was of the essence of the contract. The vendors, upon the day for the completion of the contract, were not in a position to transfer the licence under the 6 Geo. 4, Clause 61, Section 11. The purchaser was held entitled to repudiate the contract.¹ The nature of the trade viz., that of a publican made time of the essence of the contract. In *Lok v. Bell*, [1931] 1 Ch. 35, it was observed that, in the given circumstances, and particularly having regard to the subject-matter, time was of the essence of the contract. Under the terms of the contract, however, the sum of £200 damages was in the nature of a penalty, and therefore not recoverable. In *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705, it was observed that the statement that "if the vendor cannot, by the day appointed for the completion of the purchase, procure a transfer of the licence under the Licensing Act, the purchaser may repudiate the contract," was too wide. In *Newman v. Rogers* (1793), 4 Bro. C.C. 391, upon sale of a reversion, part of the terms was that purchase-money be paid by a certain time; not being so by default of the vendee, the vendor was discharged from his contract. In *Walker v. Jeffrys*,² (1842) 1 Hare 341, no proceedings were taken to enforce the

1. *Day v. Lukke*, (1868) L.R. 5 Eq. 336, was followed; for cases on this point, see *Mews' Digest of English Case Law*, vol. ii, page 1026, *Public House*.

2. *Mews' Digest* spells "Jefferys"; see *ibid.*, vol. xi, 976, and vol. xxiv.

performance of the contract or trust for upwards of two years after the refusal. Held, that so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity.¹ In *Tilley v. Thomas* (1867), L.R. 3 Ch. 61, the agreement contained these words: "Possession to be given on the 14th January next." Possession without proof of title of the vendor was tendered on January 14, but the purchaser refused to accept it. Held, that possession meant possession with a good title shown. In *Hudson v. Temple* (1860), 29 Beav. 536, time was made of the essence of the contract by a special condition. In *Harold Wood Brick Co., Ltd. v. Ferris*, [1935] 2 K.B. 198 C.A., the date September 15, 1933, fixed for completion was of the essence of the contract and as the defendant had failed to complete the purchase and had made it plain that he was unable to do so the plaintiff was entitled to treat the contract as broken and to claim the damages suffered by the breach of the contract. In *Thorpe v. Fasey*, [1949] Ch. 649, it was observed that, on the facts, the plaintiff had never made time of the essence and the defendant had never repudiated the contract. In *Barber v. Wolfe*, [1945] Ch. 187, the principle was reiterated that on rescission damages would not be awarded.

In *Howe v. Smith* (1884), 27 Ch. D. 89, the plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit. In *Gallagher v. Shilcock*, [1949] 2 K.B. 765, the contract was not rescinded. The seller on exercising his power of re-sale was required to repay to the original purchaser his deposit or bring the amount of it into account in any claim which he might make against the purchaser for damages resulting from loss on the re-sale. It has been observed in *Aberfoyle Plantations, Ltd. v. Khaw Bian Cheng*, [1960] A.C. 115 : [1959] 3 All E.R. 910 P.C., that subject to the provisions of particular contracts, the following general propositions concerning the time for fulfilment of conditions of conditional contracts for the sale of land are warranted by authority :

(i) Where the contract fixes a date for the completion of the sale, then the condition must be fulfilled by that date ;

(ii) Where the contract fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time ; and

(iii) Where the contract fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be filled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.²

As regards the sale of goods in England, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not, depends

1. See R.R. 58 (1841-43) Ch., 90.

2. *Aberfoyle Plantations, Ltd. v. Khaw Bian Cheng*, (1959) 3 All E.R. 910 P.C. : (1959)

3 W.L.R. 1011 P.C. *Smith v. Butler*, (1900) 1 Q.B. 694 : 16 T.L.R. 208 ; *Re Sandwell Park Colliery Co.*, (1928) All E.R. Rep. 651 : (1929) 1 Ch. 277.

on the terms of the contract.¹ Under Section 32 of the (Indian) Sale of Goods Act, 1930, payment and delivery are concurrent conditions. That is to say, the seller should be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer should be ready and willing to pay the price in exchange for possession of the goods.

Where the contract for purchase had limited no time for completion each party was entitled to a reasonable time for doing the various acts which he had to do.² The question of reconveyance is also governed by the same principle. But the option of repurchase may lapse in certain circumstances.³

Notice making time of the essence.—Where in a contract time was not originally of the essence of it, and there has been unreasonable delay, time may be made of the essence by a notice from the party who is himself not in default fixing a reasonable time for its completion.⁴ In cases of contracts for sale of immovable property it is thus open to one of the parties to make time of the essence of the contract by calling upon the other party who has been guilty of unreasonable delay to perform the contract within a stated time by giving him a reasonable notice.⁵ The notifying party should also state that in case of non-performance within the time so stipulated he would have the liberty of either enforcing the contract or abandoning it. In the case of a contract for the sale of land where time is not otherwise of the essence, service of such a notice is in general necessary before the party not in default may treat the contract as at an end.⁶ Similarly, even where time was originally of the essence of the contract but subsequently the condition was waived, a necessary notification may again make time of the essence of the contract.⁷ In cases where a stipulation

1. (English) Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), Section 10 (1).

2. *Green v. Sevin*, (1879) 13 Ch. 589 (Fry, J. at page 599).

3. *Alamelu Ammal, v. Radhakrishna*, A.I.R. 1964 Mad. 304; see the cases referred to.

4. *Green v. Sevin*, (1879) 13 Ch. D. 589; *Crawford v. Toogood*, (1879) 13 Ch. D. 153; *Stickney v. Keeble*, [1915] A.C. 386, 419 *H. L. Richards (Charles) Ltd. v. Oppenheim* [1950] 1 K.B. 616 C.A. [1950] 1 All E.R. 420; *Teju Kaya & Co. v. Gangji Newsey & Co.* (1933) 57 Bom. 292; *Sat Prakash v. Bodh Rai*, A.I.R. 1958 Punj. 111; *Shamjibhai v. Hemchand*, A.I.R. 1952 Nag. 220; *Shamsudin Tejibhai v. Dayabhai Maganlal*, (1924) 48 Bom. 368; *Bhagwat Narain v. Srinivas (F.B.)*, A.I.R. 1937 Patna 113; *Howe v. Smith*, 27 Ch. D. 89; *Compton v. Bagley*; [1892] 1 Bh. 313; Lord St. Leonards, *Vendors and Purchasers*, 13th ed., 227, *Official Receiver v. Baneshwar*, A.I.R. 1962 Patna 155; *Badruddin v. Tufail Ahmed*, A.I.R. 1963 M. P. 31.

5. *Rama Sastry v. Dakshina Murthy*, A.I.R. 1960 Andhra 178.

6. *Kanu v. Gonda*, A.I.R. 1947 Lah. 352; *Subayya v. Garikapati*, A.I.R. 1957 Andhra 307; *Rahmath v. Shimoga Cooperative Bank Ltd.*, A.I.R. 1951 Mys. 59.

7. *Reynolds v. Nelson*, (1821) 6 Mad. 18; *Parkin v. Thorold*, (1852) 16 Beav. 59; *Taylor v. Brown*, (1839) 2 Beav. 180; *Benson v. Lamb*, (1846) 9 Beav. 502; *Webb v. Huges*, (1870) L.R. 10 Eq. 281; *Stickney v. Keeble*, [1915] A.C. 386 *H. L. Richards (Charles) Ltd. v. Oppenheim*, [1960] 1 K.B. 616 C.A. [1950] 1 All E.R. 420; *Smith v. Hamilton*, [1951] Ch. 174; [1950] 2 All E.R. 928.

making time of the essence has been waived, time may again be made of the essence, where there is unreasonable delay by a notice from the party who is not in default fixing a reasonable time for completion stating that in the event of non-completion within the time so fixed he intends to enforce or abandon the contract. But the time fixed must be reasonable having regard to the position of things at the time when the notice is given, and to all the circumstances of the case.¹ It is always open to a party to forbear from insistence on the performance of the contract by the due date, but the forbearing party is not entitled to fix a date of its own accord which will benefit it and put the other party at a disadvantage, for instance, to undo the effect of the waiver on its part or to render the other party liable for damages, if the performance was not done by the extended date.²

Where by the terms of the contract, if there were late shipment due to *force majeure* or due to causes beyond the control of the supplier, the purchaser agreed to accept a late shipment or late supply of the goods without objection, the purchaser cannot subsequently by unilateral action (by writing to the supplier that if the goods were not delivered within a certain time he would take legal action) make time of the essence of the contract.³

Extension of time.—Where time was of the essence of a given contract but it has been subsequently extended by agreement between the parties, the extension thus agreed upon is not tantamount in the eye of law to a complete waiver of the original condition but in effect merely substitutes the extended time for the one originally fixed.⁴ Oral evidence is admissible to prove that party requested for an extension of the time for performance of a given contract.⁵ This rule, in India, is of course subject to the provisions of the Indian Evidence Act, 1872. Where time has been made of the essence of the contract, an alleged custom extending time, where any, has to be proved.⁶ If time was originally of the essence of the contract, it does not cease to be of essence because a party agreed to grant a short extension.⁷ In legitimate circumstances, however, the doctrine of equitable estoppel may intervene.

A party to a contract at the request of the other party forbears from insisting upon delivery at the contract time and may allow time to be extended, without binding himself to do so, or may expressly contract for

1. *Shiv Dayal v. Union of India*, A.I.R. 1963 Punjab 538.

2. *Dominion of India v. Bhikhranj*, A.I.R. 1957 Patna 586.

3. *Mohanakrishnan v. Chimanlal & Co.*, A.I.R. 1960 Mad. 452.

4. *Bernard v. Williams*, (1928) 139 L.T. 22. *Barclay v. Messenger*, [1874] 43 L.J. Ch. 449. *Nokes v. Kilmorey*, (1847) 2 De G. and Sm. 444. *Laxmi Narayan Mills Co. Ltd. v. Amritlal*, A.I.R. 1964 Bom. 76.

5. *Levey & Co. v. Goldberg*, [1922] 1 K.B. 688. *Hickman v. Haynes*, (1875) L.R. 10 C.P. 598.

6. *Balaram v. Govinda*, A.I.R. 1925 Mad. 1232.

7. *Lucknow Automobiles v. Replacement Parts Co.*, A.I.R. 1940 Oudh 443.

an extension of time, and that he may claim damages for non-performance at the extended time.¹

The effect of Section 55, is, where the party having the option elects not to avoid, to put the agreement after the original date on the same footing as an agreement just before the original date. Where a specific time is started, then that substituted date must hold. If there is a simple waiver of the right to extension of the original time, then a reasonable time will be the proper time for delivery. Section 55, para 3, means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time. In an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of goods.²

Where the purchaser seeks to have damages for breach of a contract assessed at a later date than that fixed by the contract for delivery, the effect of Section 55 is to put an agreement made to after the original date of performance of a contract has expired on the same footing, as the original agreement. It has, however, to be an agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to an extension of time for the performance of a contract within the meaning of Section 63 so as to alter the relevant date on which the damages are to be assessed.³

Non-performance in time when time was essential.—Where time was of the essence of a contract, and the contractor has failed to perform it at or before the specified time, the contract that remains unperformed or so much of it as remains unperformed becomes voidable at the option of the contractee. The expression “at or before a specified time” or “at or before specified times” refers to a particular stipulation as to the time of performance. Where a time for performance has been specifically fixed, a time before the specified time is not the proper time for the performance. In *Bowes v. Shand* (1877), 2 App. Cas. 455 H. L., goods were to be shipped during March and/or April, but they were shipped in February. The buyer was entitled to reject them.

To attract the first paragraph of Section 55 of the Indian Contract Act, 1872, time must be of the essence of the contract.⁴ Under paragraph one of Section 55 where in a contract time was of the essence of it and the party bound failed to perform his promise within the time specified, the contract becomes voidable at the option of the other party.⁵

1. *Ratilal v. Dalmia Cement and Paper Marketing Co. Ltd.*, A.I.R. 1943 Bom. 229.

2. *Md. Habidullah v. Bird & Co.*, A.I.R. 1922 P.C. 178.

3. *Paper Sales Ltd. v. Chokhani Bros.*, A.I.R. 1946 Bom. 429.

4. *Sooltan Chund v. Schiller*, (1879) 4 Cal. 252.

5. *Md. Hussain v. Andani Co.*, A.I.R. 1959 M.P. 30.

Where time was of the essence of the contract, on default, the vendors were entitled to rescind.¹ The mere mentioning of the fact that time should be deemed to be of the essence of the contract does not make it voidable at the instance of one of the contracting parties. Under paragraph one of Section 55, the contract becomes voidable after the lapse of the specific time if the intention of the parties were that time should be of the essence of the contract. This intention should be ascertained not only from the written words of the contract but the nature of the property which is the subject-matter of the contract, the nature of the contract itself and also from the surrounding circumstances.² The onus is on the plaintiff to show that time was of the essence.³

A. agreed with B. to transport coal from the colliery to the railway station at Rs. 2-8-0 per ton for two years. B. agreed to make the payments of bills of A. on the 10th of the following month. B. also agreed to keep the road in repair. It was found that B. was withholding substantial amounts of A.'s bills for a very long period without any reasonable cause. B. had also failed to keep the road in repair. A. stopped the transport work after about 9 months and sued B. for recovery of his bills and damages with interest. Held, that in commercial transactions time was ordinarily of the essence. In this particular contract the payment of bills by a particular date was expressly mentioned, the intention being that A. should receive payment for work executed as soon as the amount became due, and as B. failed to pay the amounts by the date fixed or even within a reasonable time after the presentation of bills, there was a breach of the condition by B. Further, the road was also not kept in repair by B. The case was therefore covered by Section 55 of the Contract Act, and A. was entitled to rescind the contract and to sue B. for damages.

Interest as damages could not be awarded. Interest up to date of suit was not claimable. As regards interest *pendente lite* until the date of realisation however within was the discretion of the Court. Interest for a period prior to the commencement of suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some cases by Courts of equity.⁴

Where the defendant had agreed that in case he was not ready with the money on or before a particular date to take the sale deed, then the plaintiffs would get compensation of Rs. 75 and that this compensation would be a charge on the defendant's B schedule properties from the said given date, it was held that time was of the essence of the contract and that the sale deed was to be executed on or before the said date.⁵ Where a contract

1. *Baldeo Dass v. Howe*, (1880) 6 C.L.R. 582.

2. *Kalidas v. Mugnooram*, A.I.R. 1955 Cal. 298.

3. *Sachindra v. G. P. & Co.*, A.I.R. 1964 Orissa 269.

4. *Mahabir Prasad v. Durga Datt*, A.I.R. 1961 S.C. 990.

5. *Mani v. Krishnan*, (F.B.) A.I.R. 1953 T.C. 377.

fails to be completed within a fixed period and therefore time is of the essence of it, the question of granting the vendor or vendee a reasonable time beyond the fixed period to do what he was required to do by the terms of the contract does not arise. Such a question arises however where a contract fails to be carried out in a reasonable time.¹ Where time was of the essence of the contract, time could not be extended by Court.²

Where the transaction is an absolute sale with an option of repurchase of the immovable property sold and where a time limit has been laid down in the agreement of repurchase and where there is no question of mutual obligation, the exceptional provision for the seller's benefit must be exercised strictly within the time prescribed as in such a case time is of the essence of the contract. Where the transaction was an absolute sale of immovable property with an option of repurchase to be exercised within a stipulated time and the seller without any tender of the price filed a suit for specific performance one day before the expiry of the prescribed time and contended that by filing the suit he was completely executed from complying with any condition of limitation as to time and could ask for the execution of a deed of resale any time later it was held that the contention was untenable and would defeat any contract or agreement in which time was of the essence.³

Even if time is of the essence of a particular contract of sale, where the vendor has not perfected his title to the goods by the date when the contract has to be completed, there is no breach of the contract on the part of the vendee, if he failed to pay the consideration on that date and to complete the contract.⁴ Even where time was of the essence of a contract, equity will give relief where it was a default by the payee such as rendered proper tender by the purchaser by due date impracticable and when it was clear that the purchaser was prepared with a ready and willing tender.⁵

Non-performance of some of the terms of the contract on part of the plaintiff in a suit for specific performance is excused when that has resulted from the default of the vendor defendant. When there is an express repudiation of the contract to sell the property by the vendor, for example, it is unnecessary for the vendee after such repudiation to tender the amount of consideration before bringing a suit for specific performance; for such a tender would be a useless formality when the vendor repudiates the contract itself.⁶

In view of Sections 55 and 63 of the Contract Act, on the expiry of the stipulated time for delivery the buyers may elect not to avoid the contract

1. *Paul Cuvreur v. Shapiro*, (a case from Palestine) A.I.R. 1948 P.C. 192.
2. *Bhagwat Narain v. Srinivas*, (S.B.), (1937) 16 Patna 202.
3. *Shriram v. Rambilas*, A.I.R. 1947 Nagpur 208.
4. *Dina Nath v. Maha Vir*, A.I.R. 1958 Punjab 289.
5. *Maung Wala v. Maung Shwe Gon*, (1923) 1 Rang. 472.
6. *Prasanta v. International Contractors, Ltd.*, A.I.R. 1955 Cal. 101.

and may extend the time for performance and where such extension is agreed to by both the seller and the buyer the agreement is binding on both of them and the seller is bound to deliver on the extended date. If the goods are not delivered, the buyer is entitled to damages for non-performance at the extended time.¹

Under Section 55, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but the promisee cannot by the mere fact of not exercising the option change or alter the date performance fixed under the contract itself. Under Section 63 the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time. Therefore it is only as a result of the operation of Section 63 that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee. The fact that the contract is not put an end to does not entail the further consequence that the time for the performance of the contract is automatically extended. Forbearance to sue or to give notice of rescission cannot be an extension of time for the performance of the contract within the meaning of Section 63.²

Where the defendant, a European, was sued for damages for non-delivery of goods and he contended that he was not bound to deliver on Sunday, it was held that delivery on Sunday was not unlawful and that in the absence of a custom to the contrary, the defendant was bound to deliver the goods on that day.³

Section 55 does not allow the promisee to keep alive a broken contract to have heavier damages.⁴ A penalty yields to compensation under Section 74 and is calculated under Section 55.⁵ As to the mode of communicating or revoking rescission of voidable contract, *see* Section 66, *post*. As to the effect of rescission, *see* Sections 75, 74, 73, 64 and 62, *post*.

Non-performance in time when time was not essential.—Where time was specified for the performance of a given contract and yet the time was not made of the essence of the contract and the contractor failed to perform it at or before the specified time, the contractee would be entitled to compensation from the contractor for any loss occasioned to him by such failure. Where time was not of the essence of a given contract its specific performance

1. *Aryan Mining v. B. N. Elias*, A.I.R. 1959 Cal. 472.

2. *Anandram v. Bholaram*, A.I.R. 1946 Bom. 1.

3. *Lalchand Balkissan v. Kersten*, (1891) 15 Bom. 338.

4. *Muthaya v. Iekku*, (1914) 37 Mad. 412.

5. *Pallonjee Eduljee v. Lonavla City Municipality*, [1937] Bom. 782.

would however be granted even after the specified time. The default of time will thus be excused whether it is on the part of the vendor or the vendee.¹ Where the time for completion specified in the contract was not of the essence of the contract, the purchaser in a sale of land is entitled to specific performance of the contract notwithstanding delay, unless there has been abandonment of the contract by him.²

In the case where the Court comes to the conclusion that time is not of the essence of the contract for the purchase of immovable property, the failure by the plaintiff to fulfil the condition of paying a portion of the purchase-money required of him under the contract within the stipulated period will not *ipso facto* disentitle him to get a decree for specific performance.³

The doctrine that equity does not ordinarily regard time as of the essence of the contract applies only where a party to a contract which is complete in all its terms has delayed in performing his part of the contract. In certain circumstances the Court will in equity condone the delay and enforce the contract. The Court has no power, however, to make a new contract between the parties. Thus where the parties agree that a contract of lease for twenty years should commence on a certain date to ask for a lease of twenty years from a subsequent date is to substitute a different lease for the original one which the Court has no power to do. The equitable doctrine of condoning the delay does not apply to such a case.⁴ Equity however will not assist where there has been undue delay on the part of one party to the contract and the other party has given notice that he must complete the contract within a definite time.⁵

The specific performance of a contract will be granted although there has been a failure to keep the dates assigned by it if justice can be done between the parties and if nothing in (a) the expressed stipulation of the parties, (b) the nature of the property or (c) the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before but not after the contract is made. The mere fact that a contract for sale of premises is said to be performed within a period of six months does not make time the essence of the contract specially when the conduct of the parties, previous to the contract, showed that there was no intention to make time the essence of the contract. Such a contract can be enforced even after the expiry of six months.⁶ Equity

1. *Jamshed Khodaram v. Burjorji Dhunjibhai*, (1916) 40 Bom. 289 P.C. : A.I.R. 1915 P.C. 83. *Sadiq Hussain v. Anup Singh* (1923) 4 Lah. 327. *Dhirajlal v. Ullasmati*, A.I.R. 1952 Saurashtra 88. *Madan Mohan v. Jawala Prashad*, A.I.R. 1950 E. P. 278.

2. *Williams v. Greatrex*, [1956] 3 All E.R. 705.

3. *Debendra v. Sakhilal*, A.I.R. 1950 Cal. 526.

4. *Dalmia Jain & Co. Ltd. v. Kalyanpore Limeworks Ltd.*, A.I.R. 1952 Patna 393.

5. *Shamjibhai v. Hemchand*, A.I.R. 1952 Nagpur 220.

6. *Arun v. Tulsi*, A.I.R. 1949 Cal. 510. *Zakir Sadagar v. Dolegobind*, A.I.R. 1955 Patna 201.

will refuse to aid a defaulter if the forfeiture is wilful or is the result of gross negligence.¹

The plaintiff sold the suit property but continued in possession. The defendant purchased the property from the plaintiff's vendee. Subsequently the defendant entered into an agreement with the plaintiff under which the defendant agreed to sell the property to the plaintiff for Rs. 2,000 to be paid at any time within 3 years with interest @ Re. 0-14-6 per cent per month. On the same day, the plaintiff executed a rent note in defendant's favour agreeing to pay Rs. 17-8-0 per month as rent. In a suit for specific performance of the agreement to sell, the agreement and the rent note were held as forming part of the same transaction. As the defendant's amount was carrying interest, time could not have been of the essence of the contract and the agreement could be specifically enforced even after the period of three years. The defendant was not entitled to both interest and rent. He was put to his election either to receive the interest or the amount of rent.²

A contract of carriage by rail is a case of contract which does not expressly or by necessary implication fix any time for the performance of the contractual obligation. That being so, the law implies that it shall be performed within a reasonable time.³ But the risk note which is executed by the consignor can protect the railway administration only so long as they carry out the transit of the goods in accordance with the terms of the contract.⁴

Where time was specified for the completion of a contract but the specified time was not made of the essence of the contract and the contract was not performed in time and neither of the parties demands specific performance of the given contract, then the promisee will be entitled to compensation from the promisor for any loss occasioned to him by the promisor's failure to perform the contract at or before the scheduled time.

When the vendors agree to sell the land which cannot be transferred without the sanction of the revenue authorities, they must be deemed to have agreed to obtain the requisite permission for the proposed transfer and it is their responsibility to move the revenue authorities to sanction the transfers and obtain the permission. When, therefore, the vendors do not take diligently steps for obtaining the sanction and fail to obtain it, it must be held that they committed a breach of their obligations under the contract. In such a case the vendors are bound to return the sum paid to them by the purchaser irrespective of the fact whether the amount was paid as earnest money or as part payment of the consideration amount. The question whether a sum of money paid under a contract for the sale of some property by the purchaser to the vendor was paid as earnest money or as part payment towards the discharge of the contract depends upon the intention of the parties and the circumstances surrounding the payment. The purchaser who

1. *Kissen Gopal v. Madan Lal*, (1937) 16 Patna 395.

2. *Sankalchand v. Joilaram*, A.I.R. 1949 Bom. 193.

3. *Managing Agents (Martin & Co.) v. Seth Deokinandan*, A.I.R. 1959 M.P. 276.

4. *Dominion of India v. Gaya Pershad*, A.I.R. 1957 All. 193.

has paid an amount towards the contract for sale can claim interest on the amount paid from the date of the institution of the suit filed for the return of the purchase-money and not from the date when the money was paid.¹

Where the primary obligation under a contract is secured by a secondary covenant to pay a penalty or liquidated damages the obligor obtains no option of breaking his primary obligation. If the obligee sues for recovery of damages he cannot in view of Section 74 recover damages in excess of the amount of penalty or liquidated damages. The obligee is, however, not bound to sue for damages. He may sue for specific performance of injunction in equity if the contract is otherwise proper to be specifically enforced. He may enforce at law an alternative relief such as right of re-entry or forfeiture. Where a tenant in addition to the payment of a fixed jama and a measure of paddy agrees that if he does not deliver paddy in any year he shall pay its value, the landlord is not bound to sue for damages. He can sue to recover the money value of the produce as rent together with interest under Section 67 of the Bengal Tenancy Act.²

Acceptance of performance out of time.—Where time was of the essence of a given contract and such contract became voidable at the option of the promisee because of its non-performance in time, and yet he accepted its performance at any time other than the one agreed, then he could not claim compensation for any loss occasioned by the non-performance of the promise in time, unless at the time of such acceptance he gave notice to the promisor of his intention to do so.

When after the seller of goods has failed to deliver them at the agreed time the buyer has agreed to an extension of time for delivery, the effect of Section 55 of the Contract Act is that the buyer is entitled to damages computed in the ordinary way if the seller fails to deliver within the extended time.³ The promise for the non-performance of which the third paragraph of Section 55 provides that compensation cannot be claimed is the promise to deliver at the time originally agreed. Where the measure of damages for a failure to deliver is the loss of the profit which the buyer would have made from delivering the goods under a contract of sale which he has made, it is not material that the buyer by delivering under that contract other goods which he has in stock has made as much profit as he would have made if there had been no failure to deliver to him.⁴

Time of essence and frustration.—See below under Section 56.

56. An agreement to do an act impossible in itself is void.

Agreement to do impossible act void.

A contract to do an act which, after the contract is made, be-

1. *Kishanlal v. Suryadatta*, A.I.R. 1958 M.P. 239

2. *Mulluk Chand v. Surendranath*, A.I.R. 1957 Cal. 217.

3. *Laxmi Narayan Mills Co. Ltd. v. Amrit Lal*, A.I.R. 1964 Bom. 76.

4. *Muhammad Habib-ullah v. Bird and Company*, (1921) 43 All. 257 P.C.

Contract to do impossible act or one which afterwards becomes impossible or illegal when void.

comes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss on non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

- (a) *A* agrees with *B* to discover treasure by magic. The agreement is void.
- (b) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.
- (c) *A* contracts to marry *B* being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make compensation to *B* for the loss caused to her by the non-performance of his promise.
- (d) *A* contracts to take in cargo for *B* at a foreign port, *A*'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

The doctrine of frustration in English law.—Frustration is the unforeseen determination or prevention of a contract by reason of the destruction of the matter or other common ground forming the basis of the agreement.¹ It may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. Frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition.²

The destruction of the subject-matter of the contract, the frustration of the common venture as well as the subsequent illegality of the performance of the contract destroy in the eye of the law the contract itself and absolve the parties from any further liabilities. Thus when a catastrophic event, caused by the act of neither party, intervenes, destroying some basic, though

1. Wharton's *Law Lexicon*, 14th ed., 1953, 440.

2. *Krell v. Henry*, [1903] 2 K.B. 740, *Cricklewood Property and Investment Trust, Ltd., v. Leighton's Investment Trust, Ltd.*, [1945] A.C. 221, 228; [1945] 1 All E.R. 252, 255. *Fibrosa Spolka Akcyjna v. Fairbairn*, [1943] A.C. 32; [1942] 2 All E.R. 122 H.L. *Ocean Tramp Tankers Corporation v. V/O Soufracht*, [1964] 1 All E.R. 161 C.A.

tacit, assumption on which the parties have contracted, and along with that assumption destroying the contract itself, the parties are discharged from further liabilities.¹

Basis of the doctrine.—The basis of the doctrine is controversial. There are two principal views² :

(i) The Court will imply in a contract a term for its discharge, but only if this accords with the presumed intention of both parties. This view is known as the theory of the implied term.

(ii) The Court will discharge a contract if to do so is just and reasonable in view of the unexpected circumstances that have supervened. This view is known as the theory of just solution,

Though generally a Court has no absolving power, it can infer from the nature of a contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted. Accordingly, if the altered conditions were such that, had they thought of them, they would have taken their chance of them and would have released each other from any further obligations, the performance of the contract is said to be frustrated.³ It will be implied in the eye of the law that the parties have tacitly agreed as between themselves that where a change of circumstances or an intervening event will prevent or stultify the performance of the contract, they will be totally discharged from further liability.

Where unexpected circumstances have occurred frustrating the common object of the parties, the law intervenes and discharges the parties from further liabilities. In the changed circumstances a compulsory adherence to the terms of the contract would in fact mean that the letter of the law was seeking to bind the parties to a contract that they did not really make. Whether the change of circumstances that has occurred or the event that has happened has been so vital as to rend the further fulfilment of the contractual obligations inconsistent with the very object of the contract is for the Court of law to judge. The effect of the event on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by informed and experienced minds. The judge finds in himself the criterion of what is reasonable. Where one party claims there has been frustration and the other party contests it, the Court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand the

1. *Sir Lindsay Parkinson & Co. Ltd. v. Works and Public Buildings Commissioners*, [1949] 2 K.B. 632, 665 : [1950] 1 All E.R. 208, 227 ; *Hamara Radio Co. v. State of Rajasthan*, A.I.R. 1964 Raj. 205.

2. *Bank Line, Ltd. v. Arthur Capel and Co.*, [1919] A.C. 435. *Denny Mott & Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, (1944) A.C. 265. *Davis Contractors, Ltd. v. Fareham Urban District Council*, [1956] A.C. 696.

3. *F. A. Tamplin S. S. Co. Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397, 404.

terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the Court which has to decide what is the true position between the parties. From this angle of vision, therefore, frustration is irrespective of the individuals concerned, their temperaments and failings, interests and circumstances. Frustration is an implication of law, not an inference of fact. It is a substantive and particular rule which the English common law has evolved. According to the theory of "just solution", frustration is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.¹ The discharge of the parties from further liabilities is thus something which operates automatically by virtue of law as soon as the facts or probabilities or relevant circumstances become sufficient to frustrate the contract.²

Another important view as to the basis of the doctrine of frustration known as the disappearance of the foundation theory. According to this third view, where a contract has been made and after its formation a contingency occurs and which contingency is of such a character that the very foundation of what the parties are deemed to have had in their contemplation has disappeared, the contract will be presumed in law to have disappeared along with the said foundation. If the foundation of the contract goes, either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance is really in effect of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated.³

If there is an event or change of circumstances which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole and beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to something to which they would not have agreed had they contemplated that event or those circumstances, the contract is frustrated by that event immediately irrespective of the volition or the intention or the knowledge of the parties as to that particular event, and even although they have continued for a time to treat the contract as still subsisting.⁴

The effect of frustration.—The law requires a party to fulfil his contractual obligations. When a party has undertaken an absolute and unconditional responsibility to do a thing without guarding himself by express stipulations against foreseeable but unforeseen contingencies the law will not come to his aid in case he is held liable for damages for the non-performance

1. *Ocean Tramp Tankers Corporation v. V/o Soufrahat*, [1964] 1 All E.R. 161 C.A.

2. *Hirji Mulji v. Cheong Yue Steamship Co.*, [1926] A.C. 497, 507. *Denny, Mott and Dickson, Ltd. v. Fraser (James B.) & Co. Ltd.*, [1944] A.C. 265, 276: [1944] 1 All E.R. 678, 684. *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435. *Baxter, Fell & Co., Ltd. v. Galbraith & Grant, Ltd.*, [1941] 70 Ll.L. Rep. 142, 157.

3. *F. A. Tamplin S. S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 397, 406. *Tatem, Ltd. v. Gamboa*, [1939] 1 K.B. 132: [1938] 3 All E.R. 135.

4. *Morgan v. Manser*, [1948] 1 K.B. 184.

of his obligations even though such non-performance has been occasioned for no fault of his.¹ When however a party is unable to fulfil his obligations for a cause which in the eye of the law is deemed to be a sufficient excuse for his non-performance he will be excused. When the unforeseen contingencies preventing the performance of the contractual obligations are so irresistible and extraneous that neither of the parties was responsible for their emergency, the contract will be deemed in law to be terminated and the parties discharged.²

According to the English common law a frustrating event brings the contract to an end forthwith. The contract is automatically terminated as to the future, because at the date of the frustrating event, any further performance of the contract becomes impossible in fact. In the circumstances, no liability for damages for the failure on either party will thenceforward be attributed.³ Though the doctrine of discharge from liability by frustration has been explained in various ways—sometimes by speaking of the disappearance of a foundation which the parties assumed to be at the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term, whichever way it is put, the legal consequence is the same.⁴ Where the doctrine of frustration applies, there is no breach of the contract. What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene.⁵ This automatic discharge as caused by frustration is distinguished from a discharge resulting from the election by a party. To take an example. An option is given to one party to treat a contract as discharged if (a) the other acts in such a way as to show an intention to repudiate his obligations, or (b) the other breaks a stipulation that goes to the root of the contract, as opposed to one that is only of subsidiary importance. In neither of these two cases the breach operates as an automatic discharge. The injured party has it in his election to treat the contract as discharged or to maintain it in operation.⁶

Operation of the doctrine of frustration.—Where the availability of

1. *Paradine v. Jane*, (1647) Aleyn 26. *Budgett & Co. v. Binnington & Co.*, [1891] 1 Q.B. 35. *Bottoms v. York Corporation*, (1892) 2 Hudson's B.C. 4th Ed. 208. *Hills v. Sughrue*, (1846) 15 M. & W. 253.

2. *Taylor v. Caldwell*, (1863) 3 B. & S. 826. *Denny, Mott & Dickson Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] A.C. 265, 272, 274 : [1944] 1 All E.R. 678, 681, 683.

3. *Hirji Mulji v. Cheong Yue S. S. Co.*, [1926] A.C. 497, 505. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32, 70 : (1942) 2 All E.R. 122, 140 H.L. *Krell v. Henry*, (1903) 2 K.B. 740. *Jackson v. Union Marine Insurance Co.*, (1874) L.R. 10 C.P. 125. *Chandler v. Webster*, (1904) 1 K.B. 493.

4. *Joseph Constantine Steam Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154. *Heyman v. Darwins, Ltd.*, [1942] A.C. 356. See Stroud: *Judicial Dictionary*, ed. 1952 vol. 2., 1187.

5. *Denny Mott & Dickson v. Fraser (James B.) & Co., Ltd.*, [1944] A.C. 265.

6. *Mersey Steel & Iron Co. v. Naylor Benzon & Co.*, (1884) 9 App. Cas. 434. *Frost v. Knight*, (1872) L.R. 7 Exch. 111.

a particular occasion, a particular thing or a particular person, or the normal state of health of such person is essential to the achievement of the basic purpose of the contract that has been entered into by the parties, but such availability has been destroyed by some intervening event for no fault of either of them, then the contract will be deemed to be dissolved since the intervention of the said unexpected event and the parties are discharged from further liabilities.¹ In order to constitute frustration, the availability of the occasion, thing or person or his state of health must be the real or sole basis of the agreement, otherwise the doctrine of frustration will not be applied.² Only where the altered circumstances have rendered the basic object of the contract unattainable, the contract is deemed to be frustrated.

Suspension of performance.—The intervention of war with the attendant laws, regulations and orders sometimes renders the performance of some contracts illegal, or it may also, because of state necessity, suspend for the time being some of the normal transactions of the citizens. When a contract has been rendered illegal, it is frustrated, and the parties are discharged from further liability then and there. But when the performance of a contract has only been suspended for the time being because of the state interference, the contract may not necessarily be deemed to be discharged. The circumstances of each individual case will decide the issue. Where the performance of the contract has been prohibited or rendered impossible for an indefinite duration the court may in a given case decree that the contract has been frustrated.³ When it appears to the court that any compulsory performance of a contract after a long interval may well be construed in the eye of a reasonable man as if altogether a new and different contract is being performed, then the contract will be deemed to be discharged because of the intervening event of interference on the part of the State. When the duration of the interference has not yet run its full course or it cannot be either gauged how long the interference will endure, the Court may still adjudge a contract to be discharged. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, the parties to a contract may well be considered to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain

1. *Krell v. Henry*, [1903] 2 K.B. 740. *Taylor v. Caldwell*, (1863) 3 B. & S. 826. *Boast v. Firth*, (1868) L.R. 4 C.P. 1. *Unger v. Preston Corporation*, [1942] 1 All E.R. 200. *Morgan v. Manser*, [1948] 1 K.B. 184; [1947] 2 All E.R. 666. *Marshall v. Glanvill*, [1917] 2 K.B. 87. *Robinson v. Davison*, (1871) L.R. 6 Exch. 269. *Poussard v. Spiers and Pond*, (1876) 1 Q.B.D. 410. *Sineon v. Watson*, (1877) 46 L.J. (Q.B.) 679.

2. *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K.B. 683.

3. *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119. *Atlantic Maritime Co., Inc. v. Gibbon* [1954] 1 Q.B. 88; [1953] 2 All E.R. 1086. See *Mugneram Bangur & Co. v. Gurbachan Singh*, A.I.R. 1965 S.C. 1523.

future period.¹ Apart from the actual duration of an interruption or the probability as to its extent which may tend to incline the Court to hold whether or not a given contract has been frustrated, the effect of a given interference has itself been the subject of individual speculations for the judges concerned. Thus even on the same fact-situation the judges may hold different views as to whether a given interference on the part of the State has rendered the contract as discharged because of frustration.²

Even where the parties have expressly provided for a possible frustrating event but the extent of the event was imponderable at the moment, the Court has decreed that the contract has been discharged because of the frustrating event. The frustrating event may be of such a nature as to have frustrated the commercial object of the venture and will be therefore construed as putting an end to the contract. But where the frustrating event has not been of so sweeping a character the obligations remain. The event in order to absolve the parties must be considered as striking at the very root of the contract itself and not merely render its performance less profitable are more arduous to one or the other of the parties concerned.³ Whether a frustration has been only temporary is a matter of construction.⁴

Frustration of commercial objects.—The commercial frustration of an adventure by delay means the happening of some unforeseen delay without the fault of either party to a contract, of such character as that by it the fulfilment of the contract in the way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.⁵

The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the

1. *Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co. Ltd.*, [1944] A.C. 265, 273; [1944] 1 All E.R. 678 : 685. *Atlantic Maritime Co., Inc. v. Gibbon*, [1954] 1 Q.B. 88 : [1953] 2 All E.R. 1086.

2. *F. A. Tamplin Steamship Co., Ltd., v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 397.

3. *Bank Line, Ltd. Capel (A.) and Co.*, [1919] A.C. 435. *Pacific Phosphate Co., Ltd. v. Empires Transport Co., Ltd.*, (1920) 36 T.L.R. 750. *Jackson v. Union Marine Insurance Co., Ltd.* (1874) L.R. 10 C.P. 125. *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119. *Eyre v Johnson*, [1946] K.B. 481 : [1946] 1 All E.R. 719.

4. *Haroon Tar Md. & Co. v. Bengal Distilleries Co. Ltd.*, [1948] 2 Cal. 11, 46.

5. *Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1916] 1 K.B. 436, approved [1917] 1 K.B. 242. *Haroon Tar Md. and Co. v. Bengal Distilleries Co. Ltd.*, [1948] 2 Cal. 11, 46.

bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract.¹ Where the conduct of the promisee has rendered performance of a contract commercially unreasonable the promisor is released from his obligation to perform the promise.²

Frustration and lease and sale of land.—The doctrine of frustration is not held applicable to the case of a lease of land whether the contract has been executed or is yet to be executed. Thus not only where a lease has been executed, that is, where the legal estate has already passed to the tenant but also where the proposed tenant has got only an equitable interest in the land under an enforceable contract for the grant of a lease the doctrine of frustration does not apply. Where the contract is only a contract for the sale of land or for the grant of the lease itself as distinct from the conveyance of the legal estate, either of the parties will be allowed to sue for the specific performance of the contract and thus achieve the transfer of the legal estate. The parties in such a state will not be allowed to invoke the doctrine of frustration. Only when the contract for the sale of the land or for the grant of the lease has been rendered incapable of specific performance, say, for the destruction of the property such destruction as a frustrating event will be allowed to be availed of.

A lease while being a contract creates an estate. A tenancy agreement, for example, is thus a contract as well as something more. When a term of years has been created by a tenancy agreement and vested in the tenant, an order disqualifying a tenant, who became an alien enemy because of the intervention of war, from personally residing in the premises does not affect the chattel interest which was vested in him by virtue of the tenancy agreement. Thus if the premises are requisitioned by the State or the local authorities or destroyed by enemy action or by fire, the tenant will continue to be liable for his obligation as stipulated in the contract of lease. Frustration does not apply also to a contract for the sale of land.³

Partial frustration.—In considering whether there has been frustration of a contract or whether such frustration is complete or only partial and temporary, what is to be looked into is the position of the parties at the time

1. *Re Badische Co.* [1921] 2 Ch. 331. See also *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1951] 2 All E.R. 617.

2. *Aerial Advertising Co. v. Batchelors Peas Ltd.*, [1938] 2 All E.R. 788.

3. *London and Northern Estate Co. v. Schlesinger*, [1916] 1 K.B. 20. *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K.B. 680, 686, 687. *Matthey v. Curling*, [1922] 2 A.C. 180, 237. *Redmond v. Dainton*, [1920] 2 K.B. 256. *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] A.C. 221, 233; [1945] 1 All E.R. 252, 258. *Denman v. Brise*, [1949] 1 K.B. 22; [1948] 2 All E.R. 141. *Hillingdon Estates Co. v. Stonfield Estates, Ltd.*, [1952] Ch. 627; [1952] 1 All E.R. 853. *Haroon Tar Md. and Co. v. Bengal Distilleries Co. Ltd.* [1948] 2 Cal. 11, 46.

of the interruption and the probabilities of its resumption as a commercial adventure from the point of view of the parties.¹ Where the contract is severable², part may remain in force and part may be frustrated.³ An arbitration clause may apply to a dispute whether a given contract is frustrated.⁴

Self-induced frustration.—The essence of frustration is that it should not be due to the act or election of the party.⁵ Court will not allow a party to avail himself of a self-induced frustration.⁶ How far and to what extent it is so, is, again, a matter of construction. When the defendant raises the plea of the frustration and the frustration has been induced by his own self, it is for the plaintiff to prove that the frustration was self-induced by the defendant.⁷ Thus where frustration is alleged to be induced by a party, the onus of proving frustration is on the party alleging frustration, and when frustration is established the onus shifts to the other party to prove that such frustration is self-induced by the party alleging it.⁸

Whether the defence of "self-induced" frustration (i.e. a reply to an allegation of frustration that the frustration was induced by the party so alleging) applies where the other party is merely negligent and does not deliberately make performance impossible, *quære*.⁹

An impossibility referable solely to the ability or circumstances of the promisor is no excuse for non-performance of a given promise.¹⁰ Thus where the mills were closed during the relevant period because of strike, the failure to supply gunny bags by the mill did not attract Section 56.¹¹ Self-induced impossibility of performance amounts to a breach of the contract on the part of the party whose conduct brings forth the impossibility.¹² Similarly, where the conduct of the promisee renders performance impossible, the other party is

1. *Haroon Tar Mohammed and Co. v. Bengal Distilleries Co.*, [1948] 2 Cal. 11, 46.

2. *Attwood v. Lamont*, [1920] 3 K.B. 571, 593 C.A.

3. *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, 367 H.L.; [1942] 1 All E.R. 337, 343. *Kruse v. Questier & Co., Ltd.*, [1933] 1 Q.B. 669; [1953] 1 All E.R. 954. *Denny, Mott & Dickson, Ltd. v. Fraser (James B.) & Co. Ltd.*, [1944] A.C. 265, 278-80, 283-84; [1944] 1 All E.R. 678, 685-87 and 688.

4. *Kruse v. Questier & Co. Ltd.*, [1953] 1 Q.B. 669; [1953] 1 All E.R. 954.

5. *Maritime National Fish, Ltd. v. Ocean Travellers, Ltd.*, [1935] A.C. 524; *Galia Kotwala v. Narasimham*, A.I.R. 1954 Mad. 119; *Narasu v. Iyer*, A.I.R. 1953 Mad. 300; *Ram Kumar v. P. C. Roy & Co.*, A.I.R. 1952 Cal. 397; *D. R. Mehta v. Tin Plate Dealers Association Ltd.*, A.I.R. 1965 Mad. 400.

6. *Bank Line, Ltd. v. Capel*, [1919] A.C. 435, 452; *Haroon Tar Md. & Co. v. Bengal Distilleries Co. Ltd.* [1948] 2 Cal. 11, 46; *Amuruvi Perumal Devasthanam v. Sabapathi*, A.I.R. 1962 Mad. 132; *Gambhirnall v. Indian Bank Ltd.*, A.I.R. 1963 Cal. 163.

7. *Joseph Constantine S. S. Lines, Ltd. v. Imperial Smelting Corp., Ltd.*, [1942] A.C. 154, 179; [1941] 2 All E.R. 165, 175.

8. *Haroon Tar Md. and Co. v. Bengal Distilleries Co. Ltd.*, [1948] 2 Cal. 11, 46.

9. *Joseph Constantine Steam Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1942] A.C. 154.

10. *Thornborow v. Whitacre*, (1705) 2 Ld. Raym., 1164.

11. *Firm Rampratap v. Sasana Sugar Works, Ltd.*, A.I.R. 1964 Patna 250.

12. *Southern Foundries (1926) Ltd. v. Skirlaw*, [1940] A.C. 701, 717 H.L.; [1940] 2 All E.R. 445, 454-55.

released from the obligation to perform the promise.¹

Post-breach frustration.—Where a party to a contract has already committed a breach of the contract, he cannot subsequently rely on a subsequent event which made the contract impossible of performance.²

Substantial performance.—The plea of impossibility will not be entertained by the Court if in spite of the surrounding events, the object and purpose of the parties are not rendered useless and the contract be performed substantially in accordance with the original intention of the parties though not literally in accordance with the language of the agreement.³

Onus of proof.—A party to a contract who proves that the performance of a contract has been frustrated is not obliged to prove also that the frustration was not due to his own neglect or default.⁴ See also *Self-induced frustration*, *supra*.

The English Law Reform (Frustrated Contracts) Act, 1943.—Any loss that may arise because of the frustration of the contract was allowed under the English common law to lie where it had fallen. The contract is deemed determined as to the future only. The parties were required under the English common law to fulfil their respective contractual obligations only so far as they had fallen due prior to the frustrating event, and they are excused from performing any obligations that might fall due after the event.

In *Chandler v. Webster* [1904] 1 K.B. 493, 499, it was held that a failure of consideration does not entitle a party to recover the money paid under a contract that has been frustrated. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32, 70 : [1942] 2 All E.R. 122, 140, H.L., a somewhat liberal view was taken on the question as to whether a money paid under a frustrated contract can be recovered by the party who has not received any consideration or benefit out of the frustrated transaction. While considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, the Court took the view that so far as a frustrated contract was concerned, the mere promise to do a thing though a sufficient consideration for the formation of a contract would not be regarded as a sufficient consideration. Only the performance of the promise on the part of the payee could debar the party paying the money from recovering it. The money was paid to secure performance, and, if performance fails, the inducement which brought about the payment is not fulfilled. Thus when there has been a total failure of consideration in this quasi-contractual sense, the party making the payment will be entitled according to *Fibrosa* case to its recovery. When the payer has received no benefit at all, the payee has

1. *Mackay v. Dick*, (1881) 6 App. Cas. 251 ; *H. L. Learoyd v. Brook*, [1891] 1 Q.B. 431 ; *Dodd v. Churton*, [1897] 1 Q.B. 562 C.A. ; *Worcester College, Oxford v. Oxford Canal Navigation*, (1911) 81 L.J. Ch. 1.

2. *Ganga Singh v. Santosh Kumar*, A.I.R. 1963 All. 201.

3. *Ganga Singh v. Santosh Kumar*, A.I.R. 1963 All. 194.

4. *Joseph Constantine Steam Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1942] A.C. 154 H.L. ; [1941] 2 All E.R. 165.

to refund the sum paid. This is so in spite of the fact that the party required to refund the money may have incurred expenses in connection with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be pre-paid, but which he now has to return. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results followed from the fact that the English common law is not used to apportion a pre-paid sum in such circumstances.

The Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6. c. 40) has since been passed in England for adjustment of rights and liabilities of parties to frustrated contracts. As to the applicability of the Act, *see* Section 2 (1) (4), *ibid.* As to its non-applicability *see* Section 2 (5).

The application of the Act is confined to a case where a contract governed by English law has become impossible of performance or been otherwise frustrated. Under the Act, money pre-paid can be recovered even though at the date of frustration there has been no total failure of consideration. The Act also allows a party who has done something in performance of the contract prior to the frustrating event to claim compensation for any benefit thereby conferred upon the other. Under Section 1 (2) of the Act, all sums paid or payable before the frustrating event is, if paid recoverable, and if not paid is not payable. Under the said Section, a Court is empowered to decree that in case the payee has received a payment and also incurred expenses in the course of performing his side of the contract, the whole or a part of the money received will be retained by him. Where he has done some work but has not received an adequate sum or any sum at all, the Court may also decree that he will be allowed to recover an adequate sum to meet his expenses. The English Act also provides for compensation to be paid for the partial performance that has taken place before the contract has been frustrated. Where a contract has become impossible of performance and has thus been discharged or it has been otherwise frustrated and thus discharged and a party has obtained a valuable benefit before the time of discharge because of anything done by the other party in pursuance of the contract, then, under Section 1 (3) of the Act, such sum will be recoverable from the party benefited as the Court will consider just. While evaluating the benefit a party has received, all the circumstances have to be taken into account. The expenses incurred by the party in question have thus also to be taken note of. The real value of the benefit as found after the frustration has taken place as well as all the questions of adjustment and set off are thus relevant for awarding the necessary compensation in favour of the party doing the part performance of the contract that has been subsequently frustrated and therefore discharged.

Where a contract contains a provision to meet the event of frustration, the English Law Reform (Frustrated Contracts) Act, 1943, will have no application. Some classes of contract have also been expressly kept without the purview of the statute. A contract for the carriage of goods by sea and a

charterparty have been excluded from the operation of the statute. If freight is made payable only at the conclusion of the voyage and the ship is prevented by some frustrating event from reaching the stipulated port, the shipowner gets nothing by way of freight. Similarly, if the freight or a part of it has been paid in advance and the ship is prevented by some frustrating event from delivering the goods at the stipulated port of discharge, the freight thus paid will not be recoverable, either in whole or in part.¹ Only a time charterparty or a charterparty by way of demise has been kept within the purview of the statute.

Contracts of insurance have been excluded from the operation of the statute.² Certain contracts for the sale of goods have also been excluded from its operation. Where there has been an agreement to sell specific goods and not a sale thereof, and the risk has not passed to the buyer and the said specific goods have perished, the agreement will be avoided under Section 7 of the English Sale of Goods Act, 1893. Secondly, any contract for the sale or for the sale and delivery of specific goods under which the risk has passed to the buyer and which contract has been frustrated by reason of the fact that the goods have perished is also excluded from the English Law Reform (Frustrated Contracts) Act, 1943. Where the goods have perished, all contracts for the sale of specific goods are thus kept outside the provisions of the said Act of 1943. Where the risk has not passed to the buyer but he has made advance payment and subsequently the goods have perished or been lost the common law of England will allow the buyer to recover his money.³

Where there is an agreement to sell specific goods, as distinguished from the actual sale thereof, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer the agreement is thereby avoided. The goods are said to have perished not only where they are physically destroyed but also where they are so damaged as to be unfit for their consumption.⁴ The agreement to sell the goods in the given case though frustrated is not affected by the provisions of the (Frustrated Contracts) Act, 1943. Where the goods are requisitioned by the Government they are not said to have perished in the given sense.⁵ Where a contract for the sale of specific goods have been frustrated by requisitioning, the Law Reform (Frustrated Contracts) Act, 1943, will apply.

Under an agreement to sell, the property in the goods is not immediately transferred to the buyer; the property remains in the seller. Unless otherwise agreed, the goods remain at the seller's risk until the property is transferred to the buyer by actual sale thereof. When, however, the

1. *St. Enoch Shipping Co. v. Phosphate Mining Co.* [1916] 2 K.B. 624. *Byrne v. Schiller* (1871) L.R. 6 Ex. 319.

2. *Tyrie v. Fletcher*, (1777) 2 Cowp. 666, 668.

3. *Logan v. Le Mesurier* (1847) 6 Moo. P.C.C. 116; 11 Jur. 1091 P.C.

4. *Asfar & Co. v. Blundell*, [1896] 1 Q.B. 123.

5. *Re Shipton, Anderson & Co. and Harrison Brothers & Co.* [1915] 3 K.B. 676.

envisage the same area of operation. That element which, *prima facie*, cannot be common to the implied term and just solution theories does not seem to have been covered either by Sections 31-36 or 56 of the Indian Contract Act. If one is permitted to get the best of both worlds, there are cases of frustration under the English common law where terms are judicially deemed to have been implied in order to furnish a just solution *per curim*, and this is a space wherein the English common law doctrine of frustration should not unnecessarily be imported into the Indian realm. Apart from supposed devolution of the English common law to the High Courts of Bombay, Calcutta and Madras to a limited extent both as respects their personal and territorial jurisdiction as successors to the Supreme Courts at the respective Presidency towns, the frequent adoption of the expressions of the English common law by the courts of record in India, including the Federal and the three Supreme Courts, in course of their evolvement of the case law of the country *prima facie* persuades one to hold that the law of frustration of contracts in India is to be found in Sections 31-36 and 56 of the Indian Contract Act as well as English judicial precedents. But, historically speaking, it should not be necessarily so.¹ In order to conform to the evolving principles of the English common law of frustration the Indian judge or jurist has not to make a procrustean bed of the Sections of the Indian Contract in order to hold whether or not in given circumstances a given contract has been frustrated. The English common law can and should be ignored where the implied terms of a given contract or the Sections 31 to 36 and 56 of the Indian Contract Act will not justify an Indian court to hold that a given contract in a given fact-situation has been frustrated in the eye of the law.

There is neither any need nor any justification to hold that Sections 32, 56 and the like provisions of the Indian Contract Act are co-extensive with the doctrine of frustration of contract under the English common law. The Indian decisions may therefore be viewed and reviewed accordingly.

When a given contract will have been found frustrated, Section 65 of the Indian Contract Act will be applied in the matter of compensation or restoration.²

Cases.—Section 56 is not exhaustive. The principle of frustration is applicable to India.³ The doctrine of frustration known to the English

1. As to the factual application of the English common law in India during the East-India Company's regime, see A. C. Patra, *The Administration of Justice under the East-India Company in Bengal, Bihar and Orissa*, Asia Publishing House, Bombay, New York, and London, 1962, Section VIII, *The Laws in Operation*. As to the rise of the Common Law in India, see M. C. Setalvad, *The Common Law in India*, London, 1961, Chap. I. See also, under Section 1, *The English Law in India*, pages 108-113, ante.

2. *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301. See under Section 65, *post*.

3. *Rama Nand v. Gokal Chand*, A.I.R. 1951 Simla 189; *Gouri Sankar v. Moitra*, (1922) 70 I.C. 379.

common law has been statutorily recognised under Section 56 of the Indian Contract Act. This statement made in *Kochuvareed v. Mariappa*, A.I.R. 1964 T.C. 10, is only partially correct. See *The Indian Contract Act and the doctrine of frustration in English common law*, supra.

In *Galia Kotwala & Co. v. Narasimham & Brother*, A.I.R. 1954 Mad. 119, almost the whole of the English common law of frustration of contracts has been repeated. The headnote of the case may therefore be cited *in extenso* :

The doctrine of frustration is not a rule of positive or substantive law, but a rule which is made applicable to interpretation of contracts to find out whether the contract has become frustrated, that it has either become impossible of performance or, though possible of performance, has become useless and ineffective. The result is that the parties to the contract are discharged from their obligations under the contract.¹

The discharge of a contract by frustration is not the result of an act or volition of a party to it nor the carrying out of a condition, express or implied, in a contract, but the presence of already existent or supervening of certain set of circumstances, which excused the performance of the contract and discharges the same. It amounts to an automatic dissolution of the contract not dependent upon the attitude of the parties to the contract.

In commercial contracts, where the contract becomes impossible of performance by reason of a state of war or by an act of the executive Government, or the contract which would otherwise be ordinarily performed, is delayed by reason of certain regulations imposed by the Government making the performance of such contract dependent upon the grant of licence or permit the parties need not wait for an indefinite period in the hope of the relaxing of the control orders or the granting of licence and permit.

Frustration arises without blame or fault on either side. No reliance can therefore be placed in self-induced frustration. Where a permit, etc., was necessary to enable a party to perform the contract, the Court will examine as to whether the party, on whom the obligation rested to apply for and obtain the permit, etc., has discharged his obligation.²

The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done hence comes within the purview of Section 56.

1. *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301.

2. *Galia Kotwala & Co. v. Narasimhan and Brother*, A.I.R. 1954 Mad. 119.

In deciding cases in India the only doctrine followed is that of supervening impossibility or illegality as laid down in Section 56, taking the word "impossible" in its practical and not literal sense. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This is really a rule of positive law and as such comes within the purview of Section 56 of the Contract Act.

According to the Indian law, which is embodied in Section 54 of the Transfer of Property Act, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently the doctrine of frustration is applicable to contracts for sale of land in India.¹

The doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end.

In applying the above principle the Court has to examine the nature and terms of the contract before it and the circumstances under which it was made or entered into and to determine whether or not the disturbing which is alleged to have happened in the particular case has substantially

1. *Satyabrata v. Mugneram*, A.I.R. 1954 S.C. 44 ; *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301.

prevented the performance of the contract as a whole. If the answer be in the affirmative, the contract will stand dissolved or discharged as it is well settled that if and when there is frustration, the dissolution of the contract occurs automatically and it does not depend, as does rescission of a contract, on the ground of repudiation or breach or on the choice of election of either party. It actually happened on the possibility of performing the contract.

An agreement of sale of certain plots of land provided for the construction of roads, etc., by the vendor before the sale was completed. The work of construction of roads could not be undertaken due to the scarcity of materials on account of war and also due to the land being requisitioned for war purposes. There was no time limit fixed for the completion of contract and the purchaser never complained about the period of requisition. It was held that in view of the very uncertain and abnormal situation of the time, it was reasonable to hold that the interruption of the construction of the roads, etc., by reason of the requisitions did not affect the fundamental basis of the contract or bargain between the parties and did not frustrate the said contract.¹

If during the subsistence of the contract any failure on the part of any of the contracting parties is alleged, the plaintiff cannot invoke the considerations which would apply in cases where the contract stood discharged either on either on the terms of the contract or under any positive law. The doctrine of frustration is essentially a doctrine of discharge of the contract. In what circumstances the contract stands discharged by subsequent events is really the subject-matter of the doctrine of frustration. The doctrine of frustration is designed, in the eye of the law, to implement what the courts presume to be the common intention of the parties.²

Frustration means the premature termination of a contract owing to the occurrence of an intervening event or change of circumstances so fundamental that the same may be regarded as striking at the root of the agreement and as wholly beyond the contemplation of the parties when they entered into the agreements. Clause (c) of Section 108 of the Transfer of Property Act, 1882, provides for the applicability of the doctrine of frustration to a limited extent even in the case of a lease.³

A Municipal Committee leased out the tonga-stands to the plaintiff. It was later found that the *tongawallas* did not use these stands but used private stands, with the result that the plaintiff could not recover any fees from them. It was contemplated by the parties that the plaintiff would collect the specified fee from the *tonga*-drivers who used the stand and it was on this assumption that the Municipal Committee leased the tonga-stands to the plaintiff who paid Rs. 5,000 to the Municipality. It was held that

1. *Mugneeram Bangur v. Gurbachan*, A.I.R. 1959 Cal. 576.

2. *Ka Ron Lanong v. State of Assam*, A.I.R. 1959 Assam 75.

3. *Valiapally v. Thomman*, A.I.R. 1956 T.C. 59; *Gurdarshan v. Bishan*, (F.B.) A.I.R. 1963 Punj. 49.

though the Municipality was not responsible for the state of affairs that ensued, no blame attached to the lessee either, and the fact remained that because of no fault on his part the very conditions on the strength of which he entered into the contract and paid the lease money to the Municipal Committee did not come into existence, and the contract was thus frustrated, and the lessee was entitled to the refund of the money paid.¹ Commercial impossibility is no impossibility under Section 56.²

The parties when they made the contract may have foreseen the supervening events as probable, but may have made no express provision with respect to them. If the events occur, frustration will be applied.³ In the absence of a condition providing for the contingency, the sinking of the goods *en route* to India was no defence to the plaintiff's claim for damages.⁴ In *Ramananda v. Hamid*, A.I.R. 1963 Mad. 94, by reason of the cyclone there were no supervening circumstances making the contract impossible of performance or unlawful. The agreement to pay bonus was ratified by the Company even after it had incurred losses. The doctrine of frustration could not apply.⁵

Impossible promise.—A promise to do an impossible act is void, that is, unenforceable. A agrees with B to discover treasure by magic. The agreement is void.

Section 56 contemplates two varieties of cases—whether the contract was impossible of performance from the very beginning or it becomes impossible on account of subsequent supervening circumstances coming into existence. Section 56 applies not merely to contracts which are physically impossible to be performed but also to those contracts the performance of which may not be literally impossible but is impracticable from the point of view of the object and purpose which the parties had in view. If an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it is in such a case that the promisor finds it impossible to do the act which he promised to do. Contracts which are merely difficult of performance are not contemplated under Section 56.⁶ As it has been observed in *D. R. Mehta v. Tin Plate Dealers*, A.I.R. 1965 Mad. 400, the Court will ascertain the facts and see how far the changing circumstances are such as to remove the very foundation of the contract.

1. *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301; *Man Singh v. Khazan Singh*, A.I.R. 1961 Raj. 277.

2. *Mahalingaswami Devasthanam v. Sambanda*, A.I.R. 1962 Mad. 122.

3. *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301; *W. J. Taten, Ltd. v. Gamboa*, [1938] 3 All E.R. 135.

4. *Ganesh Das v. Ram Nath*, (1928) 9 Lah. 148.

5. *Pearl Cycle Industries, Ltd. v. A. N. Kaul*, A.I.R. 1964 Punj. 482 (Delhi); See the cases referred to.

6. *Satyabrata v. Mugneeram*, A.I.R. 1954 S.C. 44. *State of Orissa v. Md. Khan*, A.I.R. 1961 Orissa 75. *H. V. Rajan v. G. N. Gopal*, A.I.R. 1961 Mysore 29. *Mehra & Sons v. Ram Chand Om Prakash*, (F.B.) A.I.R. 1952 Punj 34, 37.

A contract may be in writing and embody the terms agreed to by the parties and may not contain a condition excusing non-performance under certain contingencies; but still in the absence of anything to indicate a contrary intention, there is an implied condition that the contract will cease to operate if the basis on which it rests disappears or becomes fundamentally altered. The change however must be of a fundamental and sweeping character which kills the contract itself and not merely one of a temporary nature which leaves the contract alive and capable of being performed at a future date. That question is a question of fact to be determined on a consideration of all the facts. Where the contract is one to which the principle known as the doctrine of frustration is applicable the fact that the performance under the contract is a continuing one over a period and not confined to a single venture does not make it inapplicable. The frustration must be one which is not self-induced.¹

Where during the continuance of the tenancy a notice of requisition was served on the tenant requiring him to place a part of the land under his tenancy at the disposal of the Land Acquisition Collector from April 4, 1943 up to six months after the termination of the war, unless released earlier, and the said Collector took possession on November 4 as stated in the notice, it was held that though the occurrence was unforeseen and was not contemplated by the landlord and the tenant when the lease was created, yet the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant.²

Whether the doctrine of frustration is based on the doctrine of implied term or supervening impossibility or doing what is just and reasonable as between parties having regard to the actual occurrences, the legal consequence is the same. The real question is whether the event which has occurred is such and whether its relation to the contract is such, that a Judge considering the contract and the surrounding circumstances must hold that it would not be just and reasonable to hold the parties any longer to the terms of the contract. In order to do that, the Court must find that there was a common intention and a common purpose for entering into the contract and that purpose and intention have been frustrated by occurrence of a subsequent event. The Court cannot reform a contract on equitable principles. The Court cannot hold that a contract is frustrated simply because if the parties acted as reasonable men, they should have provided for a particular event. Frustration cannot depend on the unguided and uncontrolled sense of justice of the Judge deciding the matter. Every case turns on the question whether from the express terms of the particular contract a further term should be implied which, when its conditions are fulfilled, puts an end to the contract. A term can be implied in a contract only where it is possible to say from the nature of the contract

1. *Narasu v. Iyer & Ors*, A.I.R. 1953 Mad. 300.

2. *Abdul Hashem v. Balahari*, A.I.R. 1952 Cal. 380.

and the surrounding circumstances that both the parties must have contracted on a particular basis and that it was necessary to imply a term in order to give such business efficacy to the transaction as both the parties must have intended. The Court must be able to predicate of the parties a common intention and a common purpose. It is not however permissible to imply a term which is not consistent with the express terms of the contract.

A requisition of the subject-matter of a contract by the Government made during the period of performance creates a supervening impossibility and frustrates the contract, unless the parties by express terms contemplated such an event and provided against it. Self-imposed frustration does not excuse performance of the contract.¹

A promise which is manifestly incapable of performance either in fact or in law at the time of its formation cannot result in a binding or enforceable agreement. A promise which is obviously impossible is no consideration; and as such cannot base a contract. An undertaking to retire from business as proctor by a person who was not enrolled as a proctor is an undertaking without a foundation.² A convenient in a charterparty that a ship should sail or before a given date cannot be performed when the contract was entered into after the said given date.³ A contract to perform a voyage when the scheduled ship was already incapable of doing it is impossible of performance.⁴ Contracts to take rooms to see coronation at a time when His Majesty's health had already rendered postponement of the coronation inevitable were impossible of performance.⁵

Promise becoming impossible.—A contract to do an act which after the formation of the contract becomes impossible becomes void when the act becomes impossible. *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract of marriage becomes void. *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

In order that the doctrine of frustration as embodied in Section 56 of the Contract Act may apply the following three conditions should be satisfied: (a) a valid and subsisting contract between the parties; (b) there must be some part of the contract yet to be performed; (c) the contract after it is made becomes impossible.⁶

The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract. When the changed circumstances make the performance of the contract impossible, the parties are absolved from the further performance of it because the presumption is that

1. *Ram Kumar v. P. C. Roy & Co.*, A.I.R. 1952 Cal. 397.

2. *Eddison v. Rothery*, (1864) 4 New Rep. 538.

3. *Hall v. Cazenove*, (1804) 4 East 477.

4. *The Salvador* (1909) 26 T.L.R. 149 C.A.

5. *Griffiths v. Brymer*, (1903) 19 T.L.R. 434. *Clark v. Lindsay*, (1903) 88 L.T. 198.

6. *Mahadeo Prosad v. Calcutta Dyeing and Cleaning Co.*, A.I.R. 1961 Cal. 70.

they did not promise to perform an impossibility. The doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made.¹

A contract to do an act which after the contract was made, has become impossible becomes void when the act becomes impossible. When a contract becomes void, any person who has received any advantage under such contract is bound to restore it or to make compensation for it to the person from whom he received it.² A created a thatched shed on a plot and let it to B as a monthly tenant. During the tenancy the shed was burnt by fire. As the contract between A and B became impossible of performance through the negligence of A, the doctrine of frustration applied to the lease.³ Section 56 provides for a contingency. Where the very foundation of a contract has been taken away and the contract becomes impossible of performance, the defendant is bound to refund to the plaintiff the value of the goods received by him.⁴

The doctrine of frustration is that when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been contemplated by the parties to the contract when they made it, a Court will consider what, as fair and reasonable man, the parties would have agreed upon if they had in fact foreseen and provided for the particular event, and if, in its opinion, they would have decided that the contract should be regarded as at an end, will discharge the party who would otherwise be liable to pay damages for non-performance of the contract. Before the doctrine of frustration can be invoked, it must be shown that the event which has produced frustration was an event which the parties to the contract did not foresee and could not, with a reasonable diligence, have foreseen. When it has not become impossible for a party to discharge his obligation under the contract but merely burdensome to him to do so, the doctrine can have no application whatever.⁵

The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Contract Act. It is incorrect to say that Section 56 applies only to cases of physical impossibility and that where this Section is not applicable recourse can be had to the principles of English law on the subject of frustration. To the extent that the Indian Contract Act deals

1. *Shree Kishen v. Gambhirmal*, A.I.R. 1955 Hyd. 233.

2. *Manasseh Film Co. v. Gemini Picture Circuit*, A.I.R. 1944 Mad. 239. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, (1942) 2 All E.R. 122 : 111 L.J.K.B. 433 : 167 L.T. 101 : 58 T.L.R. 308.

3. *Kshilish v. Shiba Rani*, A.I.R. 1950 Cal. 441.

4. *Babulal v. Vijaya Stores*, A.I.R. 1955 Orissa 49.

5. *Surpat Singh v. Sheo Prasad*, A.I.R. 1945 Patna 300.

with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law *dehors* these statutory provisions.¹

To attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the supervening event, legislative or otherwise. Where in spite of intervention of events subsequent to the making of the agreement which were not in contemplation of the parties and which could not be foreseen with reasonable diligence, the contract could still be performed in substance, it cannot be said that the contract has become impossible of performance within the meaning of Section 56.²

The doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract ; "interference leaving a considerable part capable of performance will not be an excuse".³

When only a portion of a contract is incapable of performance, the contract does not become void or un-enforceable. In order to make out a case of impossibility of performance it must be shown that the contract could not be performed by reason of something which the promisor could not prevent.⁴ Impossibility to perform a portion arose after execution. Suit to cancel such portion was allowed under Section 56(2).⁵ Parties entered into an agreement whereby the plaintiff and his younger brother were to execute a sale-deed within a week. The refusal by the younger brother to join in the execution of the deed did not make the performance of the agreement by the plaintiff impossible within the meaning of Section 56.⁶

In *British Movietonews, Ltd. v. London Cinemas, Ltd.*, [1951] 2 All E.R. 617 H.L., it has been said that a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. Thus the principle of frustration is ultimately a question of construction. The possibility that a fundamental alteration in circumstances may sometimes bring a contract to a premature end has long been recognised. The principle of frustration has remained the same even though particular applications of it may greatly vary and theoretically it may be debated whether the rule should

1. *Mugneeram Bangur v. Gurbachan*, A.I.R. 1959 Cal. 576.

2. *Badri Narain v. Kamdeo Prasad*, A.I.R. 1961 Patna 41.

3. *Banwari Lal v. Shukrullah*, A.I.R. 1940 Patna 204.

4. *South Kanara District Board v. Santhappa*, [1925] 86 I.C. 362.

5. *Inder Pershad v. Crampbell*, (1881) 7 Cal. 474.

6. *Raspa aumi v. Trisa*, (1907) 17 M.L.J. 37.

be regarded as arising from an implied term, or because the basis of the contract no longer exists. In any view, it is a question of construction.¹

The suggestion that an "uncontemplated turn of events" is enough to enable a Court to substitute its notion of what is "just and reasonable" for the contract as it stands, even though there is no "frustrating event", appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does—not apply in that situation. When it is said that in such circumstances the Court reaches a conclusion which is "just and reasonable"² or one "which justice demands"³, the result is arrived at by putting a just construction on the contract in accordance with an implication from the presumed common intention of the parties.⁴ If the decisions in "frustration" cases are regarded as illustrations of the power and duty of a Court to put the proper construction the agreement made between the parties, having regard to the terms in which that agreement is expressed to the surrounding circumstances in which it was made, including any necessary implication, such decisions are seen to be examples of the general judicial function of interpreting a contract when there is disagreement as to its effect. What distinguishes 'frustration' cases is that the interpretation involves the consequence that, in view of what has happened, further performance is automatically ended. This is because the frustrating event (such, for example, as war or prolonged delay) must be regarded as introducing a new situation to which no limit can be put. There are, of course, many other examples where the court has to put an interpretation on the agreement made, not with the result that the contract is brought to an end by frustration, but with the result that the contract goes on and continues to bind the parties according to its true construction.⁵

1. *British Movietonews v. London Cinemas*, [1951] 2 All E.R. 617, 624 H.L. (per Viscount Simon, L.C.); *Bank Line Ltd. v. A. Capel & Co.*, [1919] A.C. 441, (per Lord Finlay, L.C.); *Denny Mott v. Fraser*, [1944] 1 All E.R. 687, (per Lord Porter); *F. A. Tamplin S. S. Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, [1916] 2 A.C. 403, 404; *Joseph Constantine S. S. Line, Ltd. v. Imperial Smelting Corp., Ltd.*, [1941] 2 All E.R. 187; [1942] A.C. 154, (per Lord Wright).

2. *Joseph Constantine S. S. Line Ltd. v. Imperial Smelting Corp., Ltd.*, [1942] A.C. 154; [1941] 2 All E.R. 186, (per Lord Wright).

3. *Hurji Mulji v. Cheong Yue S. S. Co.*, [1926] A.C. 510, (per Lord Sumner).

4. *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 455, (per Lord Sumner).

5. *Bennett, Walden & Co. v. Wood*, [1950] 2 All E.R. 134.

The advantage of approaching the topic in this way is that it makes plain that in all cases alike the question is really at bottom a question of construction.¹

For the application of the doctrine of frustration it is essential to ascertain the facts assumed by the parties as forming the fundamental basis of their contract and then to see how far the subsequent developments have resulted in the determination of the very basis of the contract, thereby rendering its performance impossible.²

When the terms of a contract or grant are reduced to writing, no condition can be implied therein, which will be inconsistent with its express terms. There may however be a condition subsequent on the happening of which the contract or grant would cease.³

Evidence of what took place after the execution of a document is not admissible on the question of its construction.⁴ The doctrine of "frustration of venture" is based not upon the existence of any actual impossibility in fact, but upon the existence, in the circumstance, of the case, of an implied condition. In order to justify such an inference the implied condition must be absolutely necessary to give effect to the transaction which the parties must have intended.⁵

Section 56 applies also to cases where a contract has become impossible of performance on account of some subsequent event which was not under the contemplation of the parties at the time they entered into it. If the supervening circumstances are such that they were within the contemplation of the parties at the time of the contract or which could reasonably be within their contemplation it would take the case out of the purview of Section 56.⁶

The occurrence which renders a contract incapable of execution must be of a kind not within the contemplation of the parties when the contract is signed, and for which they would have made provision if its possibility could have been foreseen.⁷ According to the doctrine of frustration, a subsequent event or contingency, beyond the ken of parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided, may some times operate to undermine and avoid the contract between them.⁸ A contract is not frustrated merely because the circumstances in which the contract was made are altered. On the plea of equity, a party to a contract will not be allowed

1. *British Movietonews v. London Cinemas*, [1951] 2 All E.R. 617 H.L. at pp. 625-626 (*per* Viscount Simon L. C.).

2. *Kochuvaried v. Mariappa*, A.I.R. 1954 T.C. 10.

3. *V. C. K. Bus Service v. R. T. Authority*, A.I.R. 1957 S.C. 489.

4. *Vissanji Sons & Co. v. Shapurji Burjorji*, (1912) 36 Bom. 387 P.C.

5. *Firm Sarada Prasad v. Bhut Nath*, A.I.R. 1942 Cal. 291.

6. *Man Singh v. Khazan Singh*, A.I.R. 1961 Raj. 277 ; *Firm Rampratap v. Sasana Sugar Works, Ltd.*, A.I.R. 1964 Patna 250 (strike).

7. *Sankaran v. Malabar District Board*, A.I.R 1934 Mad. 85.

8. *Gouri Sankar v. Moitra*, (1922) 70 I.C. 379.

to ignore the express covenants thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates.

The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not of itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the Court reaches a conclusion which is “just and reasonable” or “one which justice demands” this result is arrived at by putting of just construction upon the contract in accordance with an implication from the presumed common intention of the parties.¹

The general rule is that where a party has not qualified his obligation under a contract he is liable to make compensation in damages for non-performance, although the performance has been rendered impracticable by some unforeseen cause beyond his control such as failure to return hired lights due to damage caused by rioters. Section 56 of the Contract Act does not depart from this rule. When a party by his own contract creates a duty or a charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.²

The doctrine of frustration is applicable only where the frustrating event is outside the contemplation of the contracting parties. It is not applicable to an express contract to repay money in case of a supervening impossibility of performance of the major obligation. It is open to the parties to make their own bargain about this or in general about any other matter.³

Where the performance of the contract is rendered impossible due to unexpected emergence of a fundamentally different situation which no party could have foreseen and which happened in spite of them, frustration of the contract occurs and the contractor is absolved from liability.

If the performance of a contract is rendered unlawful because of a subsequent change in the law, there is an automatic discharge of the contract. Unless, however, the subsequent change in law renders the entire contract illegal, the question of frustration does not arise at all. If the law that has been subsequently enacted does not affect the contract in question and

1. *Alopi Parshad v. Union of India*, A.I.R. 1960 S.C. 588.

2. *Neer Mohamad v. Sonu Mistri*, A.I.R. 1941 Patna 429.

3. *Tacky v. Dharamsey*, A.I.R. 1947 Bom. 98.

the same can be legally performed despite the change in the law, Section 56 of the Contract Act will not be attracted.¹

Where the law casts a duty upon a man which through no fault of his he is unable to perform, he is excused for the non-performance. A part to a contract can always guard against unforeseen contingencies by express stipulation but if he voluntarily undertakes an absolute and unconditional obligation, he cannot complain merely because events turned out to his disadvantage. Mere difficulty or the need to pay abnormal prices cannot exonerate a party from carrying out his part of the contract and such a case would not be governed by Section 56. The law will allow discharge of a contract if the act to be performed is rendered illegal or impossible of performance. There should be a total impossibility. Cases of physical or legal impossibility are thus distinguished from cases of mere difficulty, in carrying out the contract.²

Before the doctrine of frustration can be invoked it must be shown that the event which has produced frustration was an event which the parties to the contract did not foresee and could not with a reasonable diligence have foreseen.³

If there is an entirely unanticipated change of circumstances the question has to be considered whether this change of circumstances has affected the performance of the contract to such an extent as to make it virtually or even extremely difficult and hazardous. If that be the case, the change of circumstances not having been brought about by the fault of either party the Courts will not enforce the contract. If on the other hand the change of circumstances has had no material effect on the contract and has not rendered the contract difficult of performance, the contract will be enforced notwithstanding the change of circumstances. There are different types of cases in which frustration may occur. First, where there has been the destruction of a specific thing necessary for the performance of the contract. Secondly, where performance becomes virtually impossible owing to a change in the law. Thirdly, where circumstances arise which made the performance of the contract impossible in the manner and at the time contemplated. Fourthly, where performance becomes impossible by reason of the death or incapacity of a party whose continued good health was essential to the carrying out of the contract.

The doctrine of frustration has been somewhat empirically evolved with the object of doing what is reasonable and fair. No matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the Court is satisfied that the parties, as reasonable people, cannot have intended that the contract should

1. *Dominion of India v. Bhikhray Jaipuria*, A.I.R. 1957 Patna 586.

2. *Habibullah v. Govt. Distilleries*, A.I.R. 1956 Hyderabad 190. *Satyabrata v. Mugneeram*, 1954 S.C.R. 310 : A.I.R. 1954 S.C. 44 *relied on*.

3. *Union of India v. Chanam Shah*, A.I.R. 1965 Pepsu 51.

apply to the new situation, then the Court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable.¹

Performance of a contract may become impossible because of the destruction of the subject-matter or of anything essential to the performance of the contract or in case of contracts of service by death or illness of the party concerned. A contract may become impossible by change in law which has the effect of rendering a contract unlawful which was lawful at the time it was made. A contract may also become impossible of performance because a state of things which was the basis of the contract has ceased to exist. A contract may also become impossible of performance in the sense that circumstances have intervened which render the performance within the time, in the way contemplated, impossible.²

A distinction has to be drawn between cases of physical impossibility and mere difficulty in carrying out a contract.³ The performance of a contract does not become impossible within the meaning of Section 56, merely because freights are not procurable from a commercial point of view. A contract can be broken on the ground that the acts to be done have become physically impossible. Physical impossibility must go farther than mere difficulty or the need to pay exorbitant prices. The latter part of Section 56 deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the making, but before the performance of the contract, and extends to such cases the general principle of law applicable to all contracts and expressed in Section 23.⁴

There is nothing surprising in a merchant's binding himself to procure certain goods at all events. It is a matter of price and of market expectations. When a contract was in terms absolute, the closing or even the destruction of the Mills, from which the goods contracted for were to come, would not affect the contract between third parties even though the Mills were contemplated as continuing to exist.⁵

The rule relating to frustration of a contract cannot come into play merely because fulfilling terms of the contract is burdensome or more expensive to one of the parties. Where a lease deed provided that the rent was fixed irrespective of the heavy rains or draught, etc., and a suit for recovery of rent was opposed on the plea that the defendant was not liable to pay the full rent as, owing to unforeseen cyclone, there was damage to the crop, there was no scope for applying the principle of frustration of contracts. What was asked for was not dispensing with the contract but a reduction of rent.⁶

1. *Parmeshwari Das and Sons v. Ram Chand*, (F.B.) A.I.R. 1952 Punjab 34.

2. *Lal Mohan v. Ramanath*, A.I.R. 1954 Tripura 17.

3. *Gurdit Singh v. Secretary of State*, A.I.R. 1931 Lah. 347.

4. *Mahalingaswami Devasthanam v. Sambanda*, A.I.R. 1962 Mad. 122. *Karl Ettlinger v. Chagandas & Co.*, (1916) 40 Bom. 301.

5. *Hurnandrai Fulchand v. Pragdas Budhsen*, (1923) 47 Bom. 344; A.I.R. 1923 P.C. 54.

6. *Suramma v. Salaramaswamy*, A.I.R. 1957 Andhra 71.

Where having regard to the express provisions of the contract and the surrounding circumstances, it was a term of the contract (whether express or implied) that the vessel was to go by the Suez Canal route and the route *via* the Cape was so circuitous, unnatural and different in a number of respects that it was to be regarded as a fundamentally different voyage a charter party was frustrated by the blocking of the Suez Canal. The position was not analogous to the case of a contract for the sale of goods. The possibility, appreciated by both parties, at the time of making their contract, that a certain event might occur, did not necessarily prevent the frustration of the contract by that event when it did occur; it was one of the surrounding circumstances to be taken into account in construing the contract, and had greater or less weight according to the degree of probability or improbability and all the facts of the case. The vessel sailed round the Cape of Good Hope. In the given circumstances of the case the shipowners were held entitled to be paid reasonable freight on a *quantum meruit*.¹

Where the defendant had agreed to deliver jaggery to the plaintiff at a particular station by railway, but due to Government order controlling the movement by railway of jaggery, the goods could not be delivered by railway and the plaintiff refused to bear the additional expenditure which the change in the mode of transport would have entailed it cannot be said, even assuming that the contract had not become impossible of performance, that the defendant committed the breach of the contract.²

In *Maxine Footwear Co., Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1959] 2 All E.R. 740 P.C., the appellants were shippers and a consignee of goods of which the respondents were carriers under a contract of carriage that was made subject, by clause paramount, to the Canadian Water Carriage of Goods Act, 1936, which incorporated the Hague Rules. After the appellants' goods had been loaded on the ship, ice from three scupper pipes was thawed by an employee of an independent contractor on the authority of the master of the ship. The officer of the ship who gave instructions for and supervised the thawing was negligent and, as a consequence of this, the thawing process resulted in a fire starting in cork insulation of the pipes. In an action by the appellants to recover damages for non-delivery of the goods the respondents contended that they had exercised due diligence to make the ship seaworthy "before and at the beginning the voyage" within the Canadian Act, 1936 and where therefore entitled to immunity under the said Act. It was held that Art. III, Rule 1 of the Schedule to the Act of 1936 was an overriding obligation and as the respondents had failed to fulfil it and that failure had caused the loss, they were not entitled to immunity.

In *Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory, Ltd.*, A.I.R.

1. *Societe Franco Tunisienne D'Armement v. Sidermar*, [1960] 3 W.L.R. 701 Q.B.D. See also *The Eugenia* [1964] 1 W.L.R. 114 C.A. (blocking of Suez canal and time charter for voyage from Black Sea to India).

2. *Narayana v. Palaniappa*, A.I.R. 1952 Mad. 670.

1945 P.C. 144 it has been observed that whether frustration occurs or not, depends on the nature of the contract and on the events which have occurred. The doctrine of frustration may apply to a contract of unascertained goods. Specifications, for example, may define the goods contracted for without defining as to the source of the goods to be supplied. Where only one of the many possible ways of performing a contract becomes illegal or impossible, there is no frustration.

A *c.i.f.* contract is not frustrated *ipso facto* if the usual or customary route is rendered impossible. By a written contract dated October, 12, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment *c.i.f.* Nice during October/November 1956. By a second written contract dated October 31, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment *c.i.f.* Marseilles during November, 1956. Shipment in both cases was to be from Port Sudan. On November 2, 1956, the Suez Canal was closed to navigation, and remained closed until April 9, 1957. The alternative route round the Cape of Good Hope was more than four times as long, and freightage by this route nearly five times as costly. No goods were shipped under either contract by the sellers, who claimed that they were prevented from doing so by the events in the Middle East.

In an appeal from arbitration proceedings between sellers and buyers, it was found that at the date of the first contract both parties, if they had given their minds to the question, would have contemplated that shipment would be made in a vessel proceeding via the Suez Canal, and that this route was then the usual and normal one; there was no finding as to the parties' state of mind at the date of the second contract. There were also the following mixed findings of law and fact:

Time of essence and frustration.—As it has been observed in *Mugnessram Bangur & Co. v. Gurbachan Singh*, A.I.R. 1965 S.C. 1523, if time is of essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed.

“(a) If after the closing of the Suez Canal the sellers had shipped the goods via the Cape of Good Hope the buyers could not have rejected the documents. (b) While it would have been more expensive to ship via the Cape of Good Hope than *via* the Suez Canal this did not make performance of the first and second contracts commercially impossible.”

On appeal it was held (1) that a *c. i. f.* contract was not frustrated *ipso facto* if the usual or customary route was rendered impossible; and (2) that having regard to the findings quoted above, the difference in expense, distance and character of the voyage round the Cape of Good Hope was not such as to render performance by that route a thing radically different from that which was undertaken by the contract, nor was there involved such a change in the significance of the obligation as would call the

principle of frustration into play and that, in consequence, neither contract was frustrated.¹

In *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1961] 2 W.L.R. 716, by a time charterparty, dated December 26, 1959; shipowners let and charterers hired the m. v. Hong Kong Fir, built in 1931, for a period of 24 calendar months "...she being in every way fitted for ordinary cargo service..." Clause 3 of the charterparty provided that "...the owners should...maintain her in a thoroughly efficient state in hull and machinery during service..." On the journey there were many serious breakdowns in the machinery of the ship. She was off hire for about 5 weeks and had about £21,400 spent on her for repairs. A further period of about 15 weeks and an expenditure of £37,500 were required to make her ready for sea. The charterers repudiated the charter party; they had no reasonable grounds, the Court found, for thinking that the owners would be unable to make her seaworthy within a reasonable time, and in fact the vessel soon became admittedly in all respects seaworthy. In an action by the owners for damages for wrongful repudiation of the charter party in which the charterers contended, *inter alia*, that they were entitled to repudiate by reason of breach by the owners of their obligation to deliver a seaworthy vessel and that the charter party was frustrated by the delays and breakdowns. *Held*, (1) that the owners were in breach of their obligation to deliver a seaworthy vessel and were also in breach of their obligation under clause 3 of the charter party to maintain the vessel in a thoroughly efficient state; (2) that the obligation to deliver a seaworthy vessel was not a condition precedent to a shipowner's rights under a charter-party, and breach of that obligation did not by itself allow a charterer to escape liability under the charter unless the delays involved in making the vessel sea-worthy were, or appeared likely at the date of the repudiation to be, so great as to frustrate the commercial purpose of the charter; (3) that for that purpose there was no difference between a "reasonable time" and a "frustrating time", and that, looking at the delays and the events which had occurred against the period and other terms of the charter party, the circumstances in which performance was called for did not render it radically different from that which was undertaken and that, therefore, the charter-party was not frustrated. The ship-owners, accordingly, were entitled to damages.

In *Davis Contractors, Ltd. v. Fareham Urban District Council*, [1955] 1 All E.R. 275 C.A., it has been observed that an unexpected turn of events which renders the performance of a contract more onerous than the parties contemplated does not release the party adversely affected from the contract. If in the course of carrying out a contract, a situation fundamentally different from anything which the parties had in contemplation is brought about by the conduct of one of them, then, even though his conduct may not

1. *Albert D. Gaon & Co. v. Societe Interprofessionelle* [1959] 3 W.L.R. 622; [1959] 2 All E.R. 693 Q.B.D.

be a breach of contract, he will not be allowed to take advantage of the new situation to the detriment of the other party when it would be unjust to allow him to do so. See also *Ocean Tramp Tankers Corporation v. V/O Sovfracht* [1964] 1 All E.R. 161 C.A. In this case it has been observed by Lord Denning, M. R., that in order to determine whether the doctrine of frustration applies, the contract has first to be construed to see whether the parties have provided for the situation that has arisen,¹ and, if they have not provided for it, then the new situation must be compared with the old to see how different it is. The difference must be more than that performance has become more onerous and expensive for one party; it must be such as to make it positively unjust to hold the parties bound.

Where a term that shipment should be via Suez could not be implied into the contracts add where the obligation of the sellers was not confined to shipping by a route usual and normal at the time of the contract, it was the duty of the sellers to put the goods on a vessel destined to the required port by a reasonable route, if available, when the Suez became unusable. Even though the route via the Cape involved a change in the method of the performance of the contract, it must be such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated. In order to constitute frustration, the shipment must be prevented by war or *force majeure* within the meaning of the contracts in question; as placing the goods on board a vessel for the right destination was not prevented by the closure of the Suez, the contracts could not be said to have been frustrated.²

In *Tsakiroglou & Co. Ltd. and Noble Thorl G. M. B. H.*, [1961] 2 W.L.R. 633 H.L., the facts were this: By a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment *c. i. f.* Hamburg during November/December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The alternative route round the Cape of Good Hope was more than twice as long, and freightage by this route far more costly. The sellers failed to ship the goods, and in arbitration proceedings the umpire held that the sellers were in default and the appeal board upheld the umpire's award. The appeal board found that "the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal". Held, (1) that a term that shipment should be (a) via Suez

1. *Tsakiroglou and Co. Ltd. v. Noble Thorl, Albert Gaon & Co. Societe Interprofessionnelle*, [1960] 2 W.L.R. 869; dictum of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145 H. L. *applied*; *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*, [1959] 1 Q.B. 131. [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 *overruled*.

2. *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*, [1959] 1 Q.B. 131; [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115 *overruled*.

or (b) by the usual and customary route at the date of the contract, should not be implied into the contract. (2) That since the Suez Canal was unusable during the relevant period the sellers' duty was to ship the goods to the required port by a reasonable and practicable route if available. (3) That although the route via the Cape involved a change in the method of performance of the contract, it was not such a fundamental change from that undertaken under the contract as to entitle the sellers to say that the contract was frustrated.¹ "For it appears to me," observed Viscount Simonds, at p. 639, "that it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated. Nor does it follow, because as a matter of construction a term cannot be implied, that the contract may not be frustrated by events." (4) That the shipment was not prevented by war or *force majeure* within the meaning of the contract; placing the goods on board a vessel for the right destination was not prevented.²

The finding of the appeal board that shipment via the Cape was not commercially or fundamentally different from shipment via the Canal was not binding on the Court for it involved a question of law.³ In view of this decision of the House of Lords any reference to the observations of the Courts below was unnecessary. The observations of the courts below are however cited below in order to render the different angles of approach accessible to the reader.

In *Tsakiroglou & Co. Ltd. v. Noble Thorl G. M. B. H.*, [1959] 2 W. L. R. 179, it will be remembered, by a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment *c. i. f.* Hamburg during November/December, 1956. On October 7 the sellers booked space in one of four vessels scheduled to call at Port Sudan in November and December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The sellers failed to ship the goods, and in arbitration proceedings, the umpire held that the sellers were in default and the appeal board upheld the umpire's award. The appeal board further found: "The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal". It was held that there was no implied term that shipment should be via a route which was, at the date of the sale contract, the usual and customary route. Though on the primary facts, a jury could properly come to the conclusion that such contract was frustrated, they could not be directed, thought Diplock J., sitting in Queen's Bench Division,

1. Observations of Bailhache J. in *In re Comptoir Commercial Anversoise and Power, Son & Co.* [1920] 1 K.B. 868, 878, C.A. *applied*.

2. Decision of the Court of Appeal [1960] 2 Q.B. 318; [1960] 2 W.L.R. 869; [1960] 2 All E.R. 160, C.A. *affirmed*.

as a matter of law to find frustration. The finding of the appeal board in the instant case was accepted as a legitimate inference of fact which was unassailable since it consisted of persons with personal knowledge of the trade. It was held therefore that as a matter of law the contract was not frustrated.

The board of appeal's finding being a finding of fact, the Court thought it had no ground for setting aside the said finding, and the consequence was that the contract was deemed as not frustrated by the closing of the Suez Canal. *Carapanayoti & Co., Ltd. v. E. T. Green, Ltd.*, [1958] 3 All E. R. 115, was distinguished. In *Carapanayoti and Co. v. E. T. Green, Ltd.*, [1958] 3 All E. R. 115, by contract September 6, 1956, goods were sold for shipment from Port Sudan during October or November, 1956, at seller's option, cost, freight and insurance to Belfast. At the date of the contract the usual and customary route for such shipments was through the Suez Canal, which had been nationalised on July 26, 1956. On October 29, 1956, the armed forces of Israel invaded Egypt; on November 1, Britain and France began military operations in Egypt and on November 2, the Suez Canal was closed to navigation and not re-opened until April 9, 1957. While the canal was closed the only route to Belfast was via the Cape. The sellers did not ship the goods and it was not possible for them to have purchased the goods afloat *c. i. f.* Belfast. The buyers claimed damages for breach of contract. It was held that under the *c. i. f.* contract containing no stipulation to the contrary the contractual obligation of the sellers in relation to the route by which the goods were to be shipped was to ship them by a route that was usual and customary at the time of performance of the contract, viz, in the instant case, a date before the end of November, 1956. The continued availability of the route through the Suez Canal was a fundamental assumption at the time when the contract was made, and accordingly performance was frustrated by the closing of the canal and both parties were discharged from the contract. As it has been noticed before this ruling was overruled in *Tsakio glou and Co. Ltd.* and *Noble Thorl G. M. B. H.*, [1961] 2 W. L. R. 633 H. L. In spite of this reversal the lower court findings and observations have been cited in order to render accessible the several angles of approach on the common law principle of frustration.

Section 56 has no application to a case where the impossibility, if any, is due to the default of the contracting party himself.¹ Self induced delay is no ground for frustration.² The essence of "frustration" is that it should not be due to the act or election of the party and it should be without any default of either party.³ Where in a charter party contract, the contract became impossible of performance in consequence of the election of one of the parties, *held*, that it was such party's own default which frustrated the

1. *Benarasi Prashad v. Mohiddin Ahmad*, (1924) 3 Pat. 581.

2. *Ocean Tramp Tankers Corporation v. V/O Soufracht*, [1964] 1 All E.R. 161 C.A.

3. *Piramu Chellamma v. Ramachandran*, A.I.R. 1963 Kerala 247.

adventure and that he could not rely on his own default to excuse him from liability under the contract.¹

If and when there is frustration the dissolution of the contract occurs automatically. It does not depend, and does rescission of a contract on the ground of repudiation or breach or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. What happens generally in such cases is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the Court *ex post facto*, on the actual circumstances of the case.²

The avoidance under cl. (e) of Section 108 of the Transfer of Property Act is differentiated from discharge of a contract by frustration because in the latter case, volition of the parties is not material, while under clause (e) the option is that of the lessee.³

Where the terms of a contract in the light of the circumstances existing when it was made shows that the parties never agreed to be bound in a fundamentally different situation which has unexpectedly emerged the contract ceases to bind at that point. Where the failure to get a required permit has totally upset the foundation upon which the parties has rested their bargain, the purchases become void under Section 56 of the Contract Act the case being one of frustration of contract.⁴

Where during the continuance of a lease of immovable property the subject of the lease was compulsorily acquired by Government under the provisions of Land Acquisition Act, 1894, performance of the contract having thereby become impossible, the lessee was entitled to obtain from the lessor compensation for the loss which he had sustained in consequence of being deprived of the possession of the demised premises.⁵

“*Force majeure*” discharges the parties from performance. Inability to obtain tonnage in certain circumstances may constitute *force majeure*.⁶ Where the contract included the performance of an act, *viz.*, the procuring of the contract of affreightment under which the goods would be delivered in the Hooghly, which after the contract was made became impossible by reason of the outbreak of war, within the meaning of Section 56 consequently, the contract became void.⁷ Possession of Government of a flat under a requisitioning order under Rule 75 (a) of the Defence of India Rules, 1939, did not amount either to eviction by title paramount or as frustration of

1. *Maritime National Fish Ltd. v. Ocean Trawlers, Ltd.*, A.I.R. 1935 P.C. 128.

2. *Satyabrata v. Mugneeram*, A.I.R. 1954 S.C. 44.

3. *Mahadeo Prosad v. Calcutta Dyeing and Cleaning Co.*, A.I.R. [1961] Cal. 70. *Court of Wards v. Dharan Dev*, A.I.R. 1961 Punj. 143. *Ganga Saran v. Ram Charan*, [1952] S.C.R. 36; A.I.R. 1952 S.C. 9 and *Satyabrata Ghose v. Mugneeram Bungur*, [1954] S.C.R. 310; A.I.R. 1954 S.C. 44, followed.

4. *Ramayya v. Sheikh Saib*, A.I.R. 1958 Andhra 576.

5. *Muhammad Hashim v. Misri*, (1922) 44 All. 229.

6. *Edmund Bendit v. Edgar Prudhomme* (1925) 48 Mad. 538; A.I.R. 1925 Mad. 628.

7. *Madhoram Hurdeo Das v. G. C. Sett*, (1918) 45 Cal. 28.

adventure. Doctrine of frustration did not apply where there was a lease whether the term was one for a fixed period or one which could be terminated by notice to quit, as the estate vested in the lessee by the lease was not extinguished by the order of requisition which was of a temporary nature.¹

The plaintiff contracted to carry in his truck certain bales of cotton belonging to the defendant from Malkapur to Khandwa, but before all the bales could be transported the plaintiff's truck was acquired by the Government for military purposes under the Defence of India Rules. It was held that the contract was frustrated.²

Where the parties were fully aware of the restriction imposed by Government on the supply of railway waggons on account of the war and a contract was entered into for the sale of goods and delivery thereof on the assumption that by the time the goods would become deliverable under the contract, the restriction would be removed, the seller was excused from performance.³

A from Palestine entered into a contract with B from Sudan for purchase of 1,000 tons of certain goods. The contract contained a stipulation that the purchase was subject to seller's export licence and buyer's import licence. Throughout the relevant contractual period, restrictions on the free movement of the contract goods were imposed in consequence of the state of war then prevailing. On 24th March, 1942, the Director of Customs, with full knowledge of the contract in question, refused to issue an import licence to A. The Director's communication about the refusal discouraged an early renewal by A of the application for the import licence. In April, E had shipped the contract goods. On 1 May, B served upon A a notice calling upon him to clear the goods shipped, adding that failure to comply would render A liable in damages and reserved the right to resell. On 4 May, A wrote in reply that as licence was refused to him on 24 March, the contract was to be regarded as cancelled from 26 March. By 5 May, B resold the goods to C and arranged for their delivery. The evidence did not indicate any easing of licensing situation between 26 March and 5 May. In an action by B against A for damages it was held that a stipulation binding each party to use reasonable diligence to obtain the licence requisite for the fulfilment of his part of the bargain should be implied. The mere fact that C got a licence was not sufficient to indicate that renewed efforts on the part of A might have succeeded. A was not held to have failed at any material time in his duty to use reasonable diligence to obtain an import licence. The action, therefore, failed.⁴

Where there was no implied condition that if the manufacture of salt became impossible owing to the strike of workmen the parties were to be excused from further performance the contract to pay rent or to make repairs to the salt pan had not become impossible of performance within the

1. *Tarabai v. Padamchad*, A.I.R. 1950 Bom. 89.

2. *Noorbux v. Kalyandas*, A.I.R. 1945 Nag. 192.

3. *Kunjilal v. Durgaprasad*, (1919-20) 24 C.W.N. 703.

4. *Israel Margolis v. Izmirlian* (a case from Palestine), A.I.R. 1949 P.C. 57.

meaning of Section 56 of the Contract Act.¹ There is no settled rule of construction that a specific exception such as strikes or war cannot be relied on if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port.² The plaintiff an advocate of the Bikaner High Court was appointed by the Bikaner State to look after its criminal work in the High Court. After merger of Bikaner, its High Court was abolished and a new High Court for the United State of Rajasthan was established at Jodhpur by an Act of the Legislature. Thereafter the services of the plaintiff were terminated by the successor State. The plaintiff thereupon sued the State of Rajasthan for damages for breach of contract. It was held that in view of the change in circumstances the contract between virtually and all that could be said was that it was discharged or put an end to and not broken. The doctrine of frustration was therefore applicable so that the plaintiff could not found an action for damages on that account.³

The Government of the *quondam* Jodhpur State entered into an agreement on 17 April, 1941, with the plaintiff for setting up a cloth mill by the plaintiff in the State. By clause 6 of the agreement it was *inter alia* provided that the State would exempt or remit State or Federal excise duty on goods manufactured in the mill premises and if any such duty had been paid by the plaintiff the State would refund the same wholly to the plaintiff. Under clause 12 of the contract the plaintiff agreed to pay the State a royalty of 7½ per cent on the net profits of the company in consideration of the concessions granted to it. The agreement was acted upon by the Jodhpur State so long as it remained in existence.

In August, 1947, the State acceded to the Dominion of India and became part of the United State of Rajasthan. On 25 January, 1950, the United State of Rajasthan adopted the Constitution of India and became the Part B State of Rajasthan. In pursuance of an agreement between the Government of India and the Raj Pramukh of Rajasthan dated 25 February, 1950, the Central Excise and Salt Act, 1944, was extended to Rajasthan under Section 11 of the Finance Act of 1950 and the Rajasthan Excise Duty Ordinance was repealed. The Union Government started recovering excise duty from the plaintiff with effect from 1 April, 1950. In a suit filed by the plaintiff against the State of Rajasthan and the Union of India the case of the plaintiff was that the contract entered into by it with the Jodhpur State on 17 April, 1941 was binding on its successors, namely, the United State of Rajasthan, The State of Rajasthan and the Union of India, and that the plaintiff should either be exempted from payment of excise duty or the excise duty paid by it should be reimbursed under the indemnity clause contained in the agreement. The suit having been dismissed the plaintiff appealed.

1. *Hart Laxman v. Secy. of State* (1928) 52 Bom. 142.

2. *Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries & Food*; *Gambaldi Societa v. President of India*. [1961] 3 W.L.R. 110 Q.A.

3. *State of Rajasthan v. Mudduswarup*, A.I.R. 1960 Rajasthan 188.

Held, that the agreement dated 17 April, 1841, was not enforceable against the respondents for the following reasons :

(i) The United State of Rajasthan did not affirm the agreement. The liabilities and obligation under it were therefore not transferred to the State of Rajasthan and the Union of India under Article 295 (1) (b) of the Constitution.

(ii) Even if the United State of Rajasthan had affirmed the agreement it would not be binding on the State of Rajasthan or the Union of India as it fettered executive and legislative action of sovereign bodies. Even if the agreement had been affirmed by the United State of Rajasthan and the liability to indemnify had devolved on the State of Rajasthan the agreement would have become frustrated within the meaning of Section 56 of the Contract Act, on the coming into force of the Finance Act, 1950, because the consideration for the agreement, namely, payment $7\frac{1}{2}$ per cent on the net profits became irrecoverable by it in view of that statute and the provisions of the Constitution.

(iii) Assuming the agreement to be special law it was repealed by Section 30 of the Rajasthan Excise Duties Ordinance, 1949, and by Section 13 of the Finance Act.¹

Where the conditions of auction sale of a liquor shop expressly provide that the acceptance of the bid sale shall be subject to the confirmation of the Chief Commissioner, there will be no completed contract till the acceptance of the highest bid is confirmed by the Chief Commissioner, and the person whose bid has been provisionally accepted is entitled to withdraw his bid. Where the bid is so withdrawn before the assent of the Chief Commissioner the bidder will not be liable on account of any breach of contract or for the shortfall on the resale.²

Reading Section 56 of the Contract Act with Section 35 of the Specific Relief Act, 1877, the Court itself which passed the decree for specific performance, could declare its own decree void if the act became impossible of performance or by reason of some event which neither party could prevent. *A* agreed to sell his share in villages for Rs. 45,000 to his co-sharer *B*. On *A*'s refusal to execute sale deed and convey title, *B* filed a suit for specific performance and obtained a decree. Before the decree was executed the villages were notified under the Madras Estates Abolition Act and were taken over by the Government. As the decree became void, *B* was entitled to withdraw the amount of Rs. 45,000 deposited by him in the suit for specific performance. Now see Sections 27 and 28 of the Specific Relief Act, 1963.

A decree for specific performance operates in favour of a contract of sale is in the nature of a preliminary decree and the original Court has full

1. *Umaid Mills Ltd. v. Union of India*, A.I.R., 1960 Rajasthan 92.

2. *Union of India v. Narain Singh*, A.I.R. 1953 Punjab 274. *Somasundaram v. Government of Madras*, (1947) Mad. 837 ; A.I.R. 1947 Mad. 366 ; *Mulhu v. Secretary of State*, 72 I.C. 436 ; A.I.R. 1923 Mad. 582.

powers to deal with any point that might arise including if necessary an application for further time.¹

The plaintiff has deposited a sum of money in Jehanabad branch of bank which had its head office at Dacca. The branch at Jehanabad was closed in September, 1947, because of the political partition of India and payments were not made to the depositors at that branch from the date. The head office of the bank being located at Dacca within the boundaries of Pakistan communication between India and Pakistan was dangerous and difficult. The defendant who had given a personal undertaking that he would be personally liable for any loss that the plaintiff might sustain, argued that the partition of India and Pakistan was not an event in the contemplation of the parties at the time the contract of guarantee was entered into and therefore the contract had become impossible of performance and therefore Section 56 applied to the case. It was held that in the circumstances, the doctrine of frustration did not apply and the defendant could not be absolved from performance under Section 56.²

In order that Section 56 would apply the following conditions must be fulfilled: (1) that the act should have become impossible, (2) that impossibility should be by reason of some event which the promisor could not prevent and (3) that the impossibility should not be self-induced by the promisor or due to his negligence. The doctrine of frustration of contract applies to cases where the very foundation of a contract disappears by virtue of circumstances coming into existence and which were not within the contemplation of the parties to the contract.

The word "impossible" is construed in a liberal sense so as to embrace within its purview acts which become impracticable or extremely hazardous and cannot be said to have been used in the Section in a physical or literal sense. It is sufficient for the act to be impossible that it becomes impracticable or useless from the view of the subject and purpose which the parties had in view.

A, the owner of certain lands situate in Tahsil Gujranwalla (Punjab) auctioned the theka of the lands in favour of B from Kharif, 1947, to Rabi, 1950, on B's depositing Rs. 34,000 as an advance consideration for the theka for one year. Regular lease and *Kabuliyat* were to be executed afterwards. In the meantime the Dominions of India and Pakistan came into existence and the lands in suit became a part of the territory of Pakistan. The plaintiff shifted to India and could therefore neither cultivate the lands nor derive any usufruct therefrom. B sued A for restitution of benefit received by A on the ground of frustration of contract. It was held that under the contract the lessee B was to derive benefit from the produce of the lands and this object was totally upset by the change of circumstances coming into existence due to the creation of the two dominions of India and Pakistan. The supervening circumstances were not at all contemplated by the parties and their

1. *Ramaswami v. Chidambaram*, A.I.R. 1954 Mad. 1040.

2. *Suresh Narain v. Akhauri*, A.I.R. 1957 Pat. 256.

effect was to render the very object of the contract completely useless and impracticable and therefore the provisions of Section 56 of the Contract Act applied to the facts and circumstances of the case. Section 56 was held applicable to the contract for lease of immovable property because such contract did not create a present demise or interest in the property.¹

Section 56 contemplates that a contract may be void under its provisions and yet compensation may be payable by the person who is unable to perform it whether the impediment is impossibility or unlawfulness, and whether the impediment existed at the time of the contract or supervened. Payment of compensation may be excused only when there is no contract to the contrary.²

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender of the land, which however had then already been attached under a decree. To perform the contract by delivery of possession of the land having thus become impossible, it was held that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him.³ Advance freight paid by a shipper to a shipowner under a charter party can be recovered back on the frustration of the venture, owing to circumstances which were beyond the control of the parties, and which they had not warranted not to exist.⁴

In a suit for damages for non-delivery of the goods, it is for the seller to prove that booking of the stipulated goods was impossible so as to make it impossible for him to make the delivery of the goods in the terms of the contract. Where however there is a positive contract to do a thing, not in itself unlawful, the contractor has to perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of the contract may become unexpectedly burdensome or even impossible.⁵ Where impossibility of performance of the contract is a defence, the burden of proving the impossibility rests on the party resting on the frustration.⁶ The expression "in itself" in the first paragraph of Section 56 has been used not merely in relation to the person agreeing but in a general sense. The words "in itself" have been omitted in the second paragraph, by the Legislature; and also in the third paragraph. The impossibility must not arise from the promisor's negligence. What is a promisor's negligence is a question of construction.⁷

1. *Hari Singh v. Dewani Vidyawati*, A.I.R. 1960 J. & K. 91.

2. *Hussainbhoy v. Haridas*, A.I.R. 1928 Sind 21.

3. *Seth Jaidayal v. Ram Sahae*, (1890) 17 Cal. 432 P.C.

4. *Gandha v. Janoo*, (1926) 49 Mad. 200.

5. *Harishchandra v. Murlidhar*, A.I.R. 1957 M.B. 53; *Mahalingaswami Devasthanam v. Sambanda*, A.I.R. 1962 Mad. 122.

6. *Pragdas v. Jeewanlal*, A.I.R. 1918 P.C. 217.

7. *Inder Prasad v. Campbell*, (1881) 7 Cal. 474 (a contract for indigo cultivation); Whitley Stokes, *Anglo-Indian Codes*, vol. I, 1887, 579.

A *c.i.f.* contract is not frustrated *ipso facto* if the usual or customary route is rendered impossible.¹ Where the parties entered into a contract of sale of bags of salt at a certain price, the contract does not get frustrated by a subsequent Government notification fixing a higher price per bag when the notification specifically mentioned that it had no retrospective effect.² Where a contract on its true construction stipulates that a particular result shall follow, if frustration should afterwards occur, that stipulation governs the matter. A stipulation may be introduced into such contracts also by custom. Where the express term referred only to a temporary impossibility of performance and had no reference to the prolonged period occasioned by the out break of war in September, 1939, the contract was frustrated.³

Force majeure.—The words *force majeure*, taken from the *Code Napoleon* and inserted as an exception in a shipbuilding contract were held by Bailhache, J., to have a more extensive meaning than “act of God” or “vis major”. He held that they covered dislocation of business owing to (a) a universal coal strike; (b) accidents to machinery; but not bad weather, football matches or a funeral”.⁴

The parties to a contract may specially stipulate that its performance will be excused if it is rendered impossible by circumstances which are generally known as act of God, the country’s enemies, *force majeure*, *vis major* or some such unvoidable cause. When the stipulations are expressly clear they are binding on the parties. An act of God is an accident due to natural causes, directly and exclusively without human intention and which could not be avoided by any amount of foresight and pains and care reasonably to be expected of the promisor.⁵ An act of God is distinct from “inevitable accident”.⁶ It means not a mere misfortune, but something overwhelming, such as storms, lightning, and tempest, which could not happen by the intervention of man, and loss from which could not have been prevented, or avoided, by any reasonable amount of foresight, pains or care.⁷ The term does not mean the act of God in the ecclesiastical and Biblical sense, according to which almost everything is said to be the act of God.⁸ The act of God is something in opposition to the act of man.⁹

1. *Albert D. Gaon and Co. v. Societe Interprofessionelle*, [1959] 3 W.L.R. 622 : [1959] 2 All E.R. 693 Q.B.D.

2. *Johari Lal v. Bihar State Co-operative Bank*, A.I.R. 1959 Pat. 477.

3. *Fibrosa Spolka Akcyjna v. Fairbairn Lamson Combe Barbour, Ltd.*, [1943] A.C. 52 H.L. (E.): [1942] 2 All E.R. 122 H.L. (E.). *Ocean Tramb Tankers Corporation v. V/o Sonfracht*, [1964] 1 All E.R. 161 C.A.

4. Stroud’s *Judicial Dictionary*, 3rd ed., vol. 2, 1952, p. 1132.

5. *Makin (J. & J.), Ltd. v. London and North Eastern Rail Co.*, (1943) K.B. 467 C.A.: [1943] 1 All E.R. 645. *Nugent v. Smith*, (1876) 1 C.P.D. 423, 434 C.A.

6. *Trent & Mersey Navigation Co. v. Wood*, (1785) 4 Doug. K.B. 286, 290, (*per* Lord Mansfield, C.J.). *Forward v. Pittard*, (1785) 1 Term. Rep. 27, 33.

7. Stroud’s *Judicial Dictionary*, 3rd ed. 1952, vol. 1, p. 45.

8. *Pandrof v. Hamilton*, (1886) 17 Q.B.D. 670, 675 C.A. (on appeal, *sub nom.* *Hamilton. Frasier & Co. v. Pandrof & Co.*, (1887) 12 App. Cas. 518 H.L.).

9. *Forward v. Pittard*, (1785) 1 Term. Rep. 27, 33.

In a mercantile sense, it means an extraordinary circumstance which could not be foreseen, and which could not be guarded against. The equivalent for this phrase in use in Scotland is *damum fatale*. In *New York Civil Code*, S. 727, an "act of God" is defined as "irresistible superhuman cause".¹ Occurrences like illness in case of a promise of personal service,² lunacy³ or death⁴ are acts of God. So also a fire caused by lightning,⁵ but not a fire not caused by lightning.⁶ An extraordinary snowfall is an act of God,⁷ but not so an ordinary snowfall.⁸ An extraordinary frost is an act of God,⁹ but not fog.¹⁰ An unprecedented rainfall is an act of God.¹¹ The rainfall in order to be an act of God in a legal sense must be such a rainfall as could not reasonably have been anticipated, and not merely an unusual rainfall such as the defendant ought to have been prepared.¹² Damage from an escape of water from a frost-burst pipe, the bursting being caused by negligently leaving the boiler filled with cold water in frosty weather is not an act of God.¹³ An extraordinary flood is an act of God.¹⁴ So also is an ordinarily high tide.¹⁵ An extraordinary flood or tide is such a flood or tide as no reasonable man would have anticipated.¹⁶ A violent storm at sea is an act of God.¹⁷ When a person by his own contract unconditionally undertakes a duty he is bound to perform it or to pay damages in spite of any act of God.¹⁸ Hence a *force majeure* clause is necessary to excuse performance.¹⁹ An act of God may sometimes amount to frustration but not generally.

In *Secretary of State for War v. Midland Great Western Rail. Co. of Ireland*,

1. Stroud, *ibid.*
2. *Cuckson v. Stones*, (1858) 1 F. & E. 248, 256. *K. v. Raschen*, (1878) 38 L.T. 38, 40.
3. *Re Bird, Bird, v. Cross*, (1894) 8 R. 326.
4. *R. v. Leicestershire Justices*, (1850) 15 Q.B. 88. *Pell v. Linnell*, (1868) L.R. 3 C.P. 441, 443.
5. *Keighley's Case* (1609) 10 Co. Rep. 139a, 140.
6. *Forward v. Pittard*: (1785) 1 Term. Rep. 27, 33.
7. *Briddon v. Great Northern Rail Co.*, (1858) 28 L.J. Ex. 51.
8. *Fenwick v. Schmasz*, (1868) L.R. 3 C.P. 313, 316.
9. *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Exch. 781.
10. *Liver Alkali Co. v. Johnson*, (1874) L.R. 9 Exch. 338.
11. *Nicols v. Marsland*, (1876) 2 Ex. D. 1 C.A. *Thomas v. Birmingham Canal Co.*, (1879) 49 L.J. Q.B. 851.
12. *Dixon v. Metropolitan Board of Works*, (1881) 7 Q.B.D. 418.
13. *Stordet v. Hall*, 1 Moore and P. 561.
14. *Nicols v. Marsland*, (1876) 2 Ex. D. 1 C.A.
15. *Nicols v. Marsland*, (1876) 2 Ex. D. 1 C.A.
16. *R. v. Essex Commrs. of Sewers*, (1885) 14 Q.B.D. 561, 581 C.A. *affd. sub nom. Fobbing Commrs. of Sewers v. R.*, (1886) 11 App. Cas. 449 H.L.
17. *Nugent v. Smith*, (1876) 1 C.P.D. 423, 434 C.A. *River Wear Comrs. v. Adamson*, (1877) 2 App. Cas. 743.
18. *Nicols v. Marsland*, (1876) 2 Ex. D. 1, 4 C.A. *River Wear Commrs. v. Adamson*, (1877) 2 App. Cas. 743 H.L. *Clifford v. Watts*, (1870) L.R. 5 C.P. 577, 586; *Sargent (W.J.) & Sons v. Paterson (Eric) & Co.*, (1923) 129 L.T. 471.
19. See *Edmund Bendit v. Edgar Frudhomme*, (1925) 48 Mad. 538; A.I.R. 1925 Mad. 628.

[1923] 2 I.R. 102, "Queen's enemies" included rebels, but not so in *R. v. Shares*, (1798) 27 St. Tr. 255, 388, 391.

In *Suresh Narain v. Akhauri*, A.I.R. 1957 Pat. 256, the plaintiff had deposited a sum of money in Jehanbad branch of bank which had its head office at Dacca. The branch at Jehanbad was closed in September, 1947, because of the political partition of India and payments were not made to the depositors at the branch from that date. The head office of the bank being located at Dacca within the boundaries of Pakistan communication between India and Pakistan was dangerous and difficult. The defendant who had given a personal undertaking that he would be personally liable for any loss that the plaintiff might sustain, argued that the partition of India and Pakistan was not an event in the contemplation of the parties at the time the contract of guarantee was entered into and therefore the contract had become impossible of performance and therefore Section 56 applied to the case. It was held that in the circumstances, the doctrine of frustration did not apply and the defendant could not be absolved from performance under Section 56.

Promise becoming unlawful.—A contract to do an act which after the formation of the contract becomes unlawful by reason of some event which the promisor could not prevent becomes void when the act becomes unlawful. A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situate. The contract becomes void when war is declared.

It is an accepted principle of maritime law that all contracts of affreightment are put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster. Where a bill of lading had become a void contract before it was tendered to the defendants, there was at that time a failure of consideration for the acceptance of the bill and they were not bound to pay at maturity.¹

Where a contract became impossible of performance under Section 56 of the Contract Act because of the prohibition by orders of Government, the defendants were bound under Section 65 to restore the sum received.² Carriers by sea are not entitled to the benefits of the Carriers Act III of 1865.³

Where a contract became illegal on the outbreak of war and therefore its performance became impossible, the defendants were entitled to a return of their deposit under Section 65.⁴

Royal Proclamation of September 1914 prohibited trading with the enemy and in enemy goods illegal frustration of contract. The defendants for their own convenience bought the goods from the Prize Court and brought

1. *Manghal & Co. v. Naginchand Fulchand*, (1918) 42 Bom. 473.

2. See *Frustration and Section 65*, under Section 65, below.

3. *Boggiano & Co. v. Arab Steamers Co. Ltd.*, (1916) 40 Bom. 529.

4. *Textile Manufacturing Co. Ltd. v. Salomon Brothers*, (1916) 40 Bom. 570; *Wolf & Sons v. Dadyba, Khimji & Co.*, (1920) 44 Bom. 631.

them to the place of performance. It was immaterial for the original contract in as much as the goods ceased to be goods consigned to the defendant, because the condemnation of the goods as from the date of seizure.¹ The fact that the goods were released by Government after having been temporarily detained will not have the effect of reviving the contract or renewing the validity of the contract which had become void before the order of the release was passed.² Where due to the outbreak of war the performance of the contract by the insured by making payments of the premium to the enemy Insurance Co. with whom the insured was insured became impossible and illegal under Rule of 104 Defence of India Rules 1939, the contract became frustrated and void.³

Where in a suit for damages for breach of a contract to purchase grain the defendant contends that he could not perform the contract owing to a Rationing Order which prohibited sale or purchase of grain except when permitted by the Controller of Supplies and Prices, the burden is on the defendant to prove that he applied for a permit but that it was not granted. The mere fact that under the Rationing Order a permit was necessary for the purchase of grain is by itself not sufficient for holding that the contract became impossible of performance. The impossibility in the performance of the contract cannot be said to arise unless and until the requisite permit was asked for and refused. It is, therefore, essential for the defendant to prove that he had applied for a permit for the purchase of grain and that as he did not get the permit, he could not perform the contract. When he has done this it would be for the plaintiff to prove that the frustration was brought about by the default or negligence of the defendant himself.⁴

By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jeddah, in their steamer 500 pilgrims. The defendants refused to receive the pilgrims on board their steamer on the ground that they had come from Singapore to Bombay on board a ship during whose voyage there had been an outbreak of small-pox on board and that the pilgrims had been in close contact with those who had been suffering from the disease. *Held*, that the performance of the contract had not become unlawful. The risk was not greater than would necessarily be incurred in every crowded emigrant ship. Even if special precautions were desirable, it was for the defendants, who had entered into an absolute agreement, to have taken them.⁵

Non-performance of promise known to the promisor as impossible but not known to the promisee to be so.—Where the promisor has promised to do something which he knew, or with reasonable diligence might

1. *Abdul Razak v. Khandi Row*, (1918) 41 Mad. 225.

2. *Soorthingjee v. Nasurudeen*, (1917) 40 I.C. 526.

3. *Ferguson & Co. v. Lalit Mohan*, A.I.R. 1954 Patna 596.

4. *Dinanath v. Premchand*, A.I.R. 1957 M.B. 186.

5. *Bombay and Persia Steam Navigation Co. Ltd. v. Rubattino Co. Ltd.*, (1890) 14 Bom. 147.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees, for it is a contract.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house and is a void agreement.

Alternative promises and impossibility of performance.—Where a promise has been made in an alternative form, and one alternative is or becomes impossible of performance and the other remains performable, the contract is not frustrated. The promisor is required as a general rule to perform the performable alternative.¹ This general rule is subject to the intention of the parties, to be ascertained from the nature and terms of the contract and the surrounding circumstances of the given case.² Where the promisor has elected which alternative he will perform and the performance of the chosen alternative becomes subsequently impossible, he will not be excused for failure to perform the alternative chosen by him.³

Alternative ways of performance.—There is no frustration of a given contract if only one of the several possible ways of its performance becomes illegal.⁴

Law revision.—Whitley Stokes in his *Anglo-Indian Codes*, vol. I, 1887, at page 580 observes: "Section 56 is out of place. It should be placed with the other Sections (24-30) relating to void agreements". It will be submitted, Section 56, worded as it is, might be placed with Sections 24-30. But as Section 56 deals also with compensation, it is not altogether out of place. Section 56 might also be placed under "Contracts which need not be performed", that is to say in the group of Sections 62-67. The result is that unless the provisions of Section 56 were split and placed in different sections, the Section should be left as it is. When the Indian Contract Act, 1872, has worked for about a century it will not be advisable to rearrange the Sections in the pattern of a textbook on the English common law of contract.

Reciprocal promise to do things some of which are legal and others illegal.—Where the parties to a contract reciprocally promise first, to do things which are legal, and secondly, to do things which are illegal, then the first set being a legal set of reciprocal promises is enforceable and the second set being an illegal set is not enforceable. *A* and *B* agree that *A* shall sell *B* a specified house for Rs. 10,000, but they also agree that the price will be Rs. 50,000 if the house is used as a gambling house. The reciprocal promises of the sale of the house and the payment of

1. *Wigley v. Blackwal*, (1600) Cro. Eliz. 780; *Da Costa v. Davis*, (1798) 1 Bros. & P. 242; *Stevens v. Webb*, (1835) 7 C. & P. 60; *Bute v. Thompson*, (1844) 13 M. & W. 487; *Barkworth v. Young*, (1856) 4 Drew. 1; *McIlquham v. Taylor*, [1895] 1 Ch. 53 C.A.

2. *Barkworth v. Young*, (1856) 4 Drew. 1, 24, 25; *Anderson v. Commercial Union Assurance Co.*, (1885) 55 L. J. Q. B. 146, 150 C.A., (*per* Bowen L. J.)

3. *Braun v. Royal Insurance Co.*, (1859) 1 E. & E. 853.

4. *Twentsche Overseas Trading Co. Ltd. v. Uganda Sagar Factory, Ltd.*, (1944) 114 L. J. P.C. 25; *Hindley & Co. Ltd. v. General Fibre Co. Ltd.*, [1940] 2 K.B. 517; *Beves & Co. Ltd. v. Farkas*, [1953] 1 Ll. Rep. 103.

Rs. 10,000 are enforceable. The second set of reciprocal promises being opposed to the public policy of the law is illegal and therefore Rs. 50,000 are not realizable.

Where a transaction comprises several sets of reciprocal promises some of which are legal and the rest are illegal and the legal promises are separable from and independent of the illegal ones, the legal set is not contaminated by the illegality of the illegal set and as such it can be enforced. Had there been only one consideration as the basis of all the sets of promises and the said consideration tainted with illegality all the sets would be unenforceable.¹

Section 57 deals with sets of reciprocal promises some of which are legal and others illegal. Each set consists in its own promise and its own consideration. The several sets of promises are not only severable but are totally separate and distinct. They come under one section perhaps because they happen to be formed at the same time and between the same parties. By way of abundant caution the Legislature enunciates a rule which is also otherwise obvious. Had not the several sets of promises been quite distinct, Section 24 would apply.²

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

In alternative promise, one branch being illegal, legal branch alone enforceable.

Illustration

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice and a void agreement as to the opium.

Alternative promises some of which are illegal.—Where promises have been made alternatively and one branch of them is legal and the other illegal, only the legal branch can be enforced. *A and B agree that A shall pay B Rs. 1,000 for which B shall afterwards deliver to A either rice or smuggled opium for the sum. The promises on the part of B being alternative, only the legal branch for the supply of rice is enforceable.*

Appropriation of Payments

59. Where a debtor owing several distinct debts to one person, makes a payment, to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

1. See Halsbury's *Laws of England*, 3d ed, vol. 8, 1954. the references (u) at p. 148.

2. Whitley Stokes : *Anglo-Indian Codes*, vol. I, 1887, p. 580.

Illustrations

(a) *A* owes *B* among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *B* among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

Application of payment indicated by debtor.—Where a debtor owes several distinct debts to a creditor and makes a payment to him intimating or directing expressly or by implication that the sum was to be applied to the discharge of a particular debt, then if the creditor accepts the said sum, it must be applied to the discharge of that particular debt and no other.¹ Section 59 deals with these cases where there are several distinct debts and it does not apply where there is only one debt. See *Bansilal v. Sant Ram*, A.I.R. 1965 Punj. 375. Where there were circumstances indicating that the payments were made in liquidation of the bond, the plaintiff was not entitled to appropriate the payments to the antecedent debts.² The intention as to the manner of application may be express or implied. In both the illustrations appended to Section 59, the Court will presume that in the given circumstances it was implied by the debtor that of the several debts owing by him to the creditor those two particular debts would be discharged.

As a general rule, the debtor has first right to appropriate.³ The money must be applied in the manner indicated by the debtor.⁴ The appropriation by the debtor if not made in express terms has to be communicated to his creditor. In the absence of the necessary communication, in order to avail the debtor an appropriation by him must be capable of being inferred. The intention of appropriation may be inferred from the nature of the transaction or the circumstances of the case.⁵ Thus where payments were made by husband under maintenance order, they were appropriated to arrears in respect of which committal order had been made and not to current payments.⁶ In particular circumstances, the sale

1. *Foster v. Chetty Firm*, (1924) 2 Rang. 204; *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151; *Har Sahay v. Gokul Chand*, A.I.R. 1947 Pat 273; *Jiban Ram v. Sagarmal*, A.I.R. 1933 Pat. 267.

2. *Sungui Lal v. Baijnath*, (1886) 19 Cal. 164.

3. *Prabirendra v. Anil*, A.I.R. 1956 Cal. 570.

4. *Dasharathi v. Abdul Hannan*, (1928) 55 Cal. 624; *Relu Mal v. Ahmad*, (1926) 7 Lah. 17; *Cory Brothers & Co. v. Mecca, Turkish S. S. (Owners). The Mecca*, [1897] A.C. 286; *H. L. Croft v. Lumley*, (1858) 6 H. L. Cas. 672; *Simson v. Ingham*, (1823) 2 B. & C. 65; *Devaynes v. Noble, Clayton's Case*, (1816) 1 Mer. 572, 608; *Peters v. Anderson*, (1814) 5 Taunt 596.

5. *Stepney Corpn. v. Osofsky*, [1937] 3 All E.R. 289 C.A.; *Leeson v. Leeson*, [1936] 2 K.B. 156 C.A.; *Marryatts v. White*, (1817) 2 Stark; *Shaw v. Picton*, (1825) 4 B. & C. 715; *Bardwell v. Lydall*, (1831) 7 Bing. 489; *Raikes v. Todd*, (1838) 33 L.J.Q.B. 49; *Newmarch v. Clay*, (1811) 14 East, 239; *Browning v. Baldwin*, (1949) 40 L.T. 248.

6. *R. v. Miskin Lower Justices, Ex parte Young*, [1953] 1 All E.R. 495; [1953] 1 Q.B. 533.

proceeds of a mortgaged property were held as appropriated in the mortgage account and not a trade account.¹ Where the debtor denies the existence of a particular debt and makes a payment, it will not be appropriated in the account of the debt denied.² Payment of interest in particular circumstances was held as appropriated in reference to a debt not already barred by the law as to limitation of suits.³

When a debtor pays a sum without directing its application to the discharge of a particular debt, he can later give intimation of its application until creditor has meantime appropriated.⁴ If the debtor on paying a sum stipulates that it shall go in discharge of principal, and not interest, the creditor can refuse to accept it on that condition, but if he accepts it he is bound by the appropriation.⁵ Where the payment was by implication intended for the January *kist*, it should have been so appropriated.⁶ Sections 59 and 60 of the Contract Act are applicable to payments made on account of debt under the Public Demands Recovery Act, 1895.⁷ In a question with the revenue the tax-payer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself.⁸ Section 59 has no application to a case of a single debt payable by instalments.⁹

The debtor gets under Section 59 the right of appropriation only when there are several distinct debts owned by him. The arrears of land revenue and the costs incurred in its recovery are not two distinct debts. As they form a single debt, the debtor has no right of appropriation under Section 59.¹⁰ Where certain sum is due for costs, interest and principal as awarded by a decree it constitutes only one debt, and technically the provisions of Sections 59 and 60 of the Contract Act do not apply.¹¹

The test to determine whether the dues were one debt or several distinct debts within the meaning of Section 59 of the Contract Act is whether the plaintiff could sue for such dues under Order 2 Rule 2 of the Civil Procedure Code. Where the salary payable to the plaintiff was a monthly pay and thus became due for one month's work at the end of the month, each month's salary was a several and distinct debt. The plaintiff was therefore entitled to appropriate the amounts paid to him towards his past salary.¹²

1. *Young v. English*, (1843) 7 Beav. 10.
2. *Burn v. Boulton*, (1846) 2 C.B. 276.
3. *Nash v. Hodgson*, (1855) 6 De. G. M. & G. 474.
4. *Chegganmull v. Manicka*, A.I.R. 1926 Mad. 792.
5. *Nemi Chand v. Radha Kishan*, (1921) 48 Cal. 839 P.C.
6. *Jogendra v. Uma*, (1908) 35 Cal 636.
7. *Nandan v. Parakh Narain*, (1909-10) 14 C.W.N. 607.
8. *Commissioner of I.-T., Bihar and Orissa v. Kameshwar*, A.I.R. 1933 P.C. 108.
9. *Fazal Husain v. Jiwan Ali*, (1906) 3 All. L.J. 430.
10. *Wasudeo v. Namdeo*, A.I.R. 1951 Nagpur 155.
11. *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151.
12. *Banambar v. Udayanath*, A.I.R. 1961 Orissa 148.

The law gives the first right of appropriation to the debtor or the tenant which has to be exercised at the time of payment unless it is reserved for exercise at a subsequent point of time,¹ and failing that the right of appropriation passes on to the creditor or the landlord and he can exercise it irrespective of and even contrary to any intermediate direction from the debtor or the tenant.²

A owed certain money to B under a promissory note, and sent to B an amount much larger than the one covered by the promissory note. B sued on the promissory note. It was held that it was for B to prove that the amount due under the promissory note had not been taken from the amount sent by A. The mere fact that the promissory note was found to be in the possession of the plaintiff was not sufficient for holding that the liability under it had not been discharged.³ Where the creditor had no opportunity whatever of either accepting or refusing to accept the payment on the stipulations made by the debtor, the appropriation made by the debtor was not binding on the creditor.⁴ Rent arrears are a debt.⁵

60. Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where debt to be discharged is not indicated.

Application of payment not indicated by debtor.—Where a debtor owes several distinct debts to a creditor and he makes a payment without indicating or directing either expressly or by implication that a particular debt out of the several should be discharged thereby, it will be optional for the creditor to appropriate the said payment towards the satisfaction of any of the debts due to him even though such debt at the time of the application of the sum repaid was barred by the law as to limitation of suits.⁶ The bar of limitation does not extinguish a debt. By limitation, only the remedy is barred or discharged. The barred debt may be effectively insisted on for certain purposes.⁷ The creditor may, at his discretion, apply, to one or other of the debts due to him, payments made by the debtor.⁸

* 1. *Kedar Nath v. Chhaju Mal*, A.I.R. 1962 All. 586.

2. *Prabirendra v. Anil*, A.I.R. 1956 Cal. 570.

3. *Unikali v. Krishna*, A.I.R. 1952 T.C. 203.

4. *John Picard v. Gregory Pinto*, A.I.R. 1962 Mys. 190.

5. *Paras Nath v. Kishna Lal*, A.I.R. 1965 All. 189.

6. *Bosanquet v. Wray*, (1815) 6 Taunt. 597. *Mills v. Fowkes*, (1839) 5 Bing. N.C. 455. *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151. *Bishun Perkash v. Md. Sadique*, (1916) 35 I.C. 375. *Jiban Ram v. Sagarmal*, A.I.R. 1933 Pat. 267. *Har Sahay v. Gokul Chand*, A.I.R. 1947 Patna 273.

7. *Nursingh v. Hurryhur*, (1880) 6 C.L.J. 489.

8. *Rameswar Koer v. Mahomed Mehdi Hossain Khan*, (1899) 26 Cal. 39 P.C.

Where under Section 60, the creditor has applied a sum in part payment of a time-barred debt, such payment does not revive the unpaid portion of the debt for the purpose of limitation as to suits.¹ Failing an appropriation by the debtor, the creditor may appropriate the repayments towards his previous debts which would otherwise be barred by limitation. In such a case the claim is not barred by limitation if the suit for the balance is brought within three years of the transaction to which the balance relates.²

Where, with respect to the goods sold at different dates, no fixed period of credit was agreed upon, and a payment within the meaning of Section 20 of the Limitation Act was made towards the account, the creditor was entitled to appropriate it towards all the items which were outstanding on the date of the payment and it would give fresh period of limitation to items which were not barred by limitation on the date of that payment.³

Payment could be appropriated to the discharge of charges by a local authority for services which were irrevocable through lapse of time.⁴ In *Smith v. Betty*, [1903] 2 K.B. 317 C.A., it has been observed that a payment cannot be appropriated to a debt barred by an Act after a suit has been brought and judgment given directing an account to be taken of the amount due, excluding the said statute-barred items. The same rule of application holds also in the case of a debt where it was unenforceable because of some formal defect in the contract upon which the said unenforceable debt arose.⁵ An unqualified dentist in England was held entitled to apply payment towards charges which he not being a qualified dentist could not recover by suit.⁶ Similarly, in case of application of sums paid to the discharge of fees of a solicitor which were not recoverable in England for want of a retainer under seal,⁷ or in case of a debt due for liquor supplied in excess of quantities allowed under an Act.⁸

If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor.⁹ In *Lowther v. Heaver*, (1889) 41 Ch. D. 240 C.A., it was held that the onus lay on the creditor to show that the debtor had not appropriated any payments in order to entitle the creditor to do so. The creditor's option as to application need not be made by express words. It can be indicated by bringing

1. *Friend v. Young*, [1897] 2 Ch. 421.
2. *Har Sahay v. Gokul Chand*, A.I.R. 1947 Pat. 273.
3. *Chandra Nath v. Prahlad Narain*, A.I.R. 1961 Raj. 154.
4. *Stepney Corpn. v. Osofsky*, [1937] 3 All E.R. 289 C.A.
5. *Bosanquet v. Wray*, (1815) 6 Taunt. 597.
6. *Seymour v. Pickett*, [1905] 1 K.B. 715 C.A.
7. *Arnold v. Poole Corpn.*, (1842) 4 Mang. & G. 860.
8. *Cruickshanks v. Rose*, (1831) 1 Mood. & R. 100.
9. *Relu Mal v. Ahmad*, (1926) 7 Lah. 17. *Dasharathi v. Abdul Hannan*, (1928) 55 Cal. 624. *Jacob v. George*, A.I.R. 1951 T.C. 80. *Kunjamohan v. Karunakanta*, (1933) 60 Cal. 1265. *Peters v. Anderson*, (1815) 5 Taunt. 596. *Devaynes v. Noble, Clayton's Case*, (1816) 1 Mer. 572, 608. *Simsom v. Ingham*, (1823) 2 B. & C. 65. *Craft v. Lumley*, (1858) 6 H. L. Cas. 672. *Cory Brothers and Co. v. Mecca, Turkish S. S. (Owners)*, *The Mecca* (1897) A.C. 286 H.L.

a suit or in any other way.¹ The rule applicable to appropriation by the creditor does not however extend to a debt which was illegal. The claim to be satisfied must be a legal or equitable demand. Debts arising out of an illegal usurious contract cannot benefit from the rule of appropriation.² The appropriation by the plaintiff of the payment to an illegal contract is prohibited by Section 60 of the Contract Act. Thus, where the plaintiff who had licence under the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944, supplied standard cloth, as defined in Section 2(10) of the Order, to the defendant, who had no licence, for being sold in his shop, the amount due as the price of standard cloth is not a lawful claim made by the plaintiff and, therefore, the appropriation of a portion of the payment made by the defendant towards the price of standard cloth is also not permissible in the eye of the law.³

In order that a creditor may take advantage of the provisions of Section 60 and will be entitled to exercise his free option to appropriate towards any other debt, he has got to prove it to the satisfaction of the Court that there was a lawful debt actually due and payable to him from the debtor and that he had appropriated the same in discharge of the said debt. If the creditor is not entitled to the benefit of Section 60 and there is no other debt proved before the Court, the amounts admitted to have been received by the plaintiff are applied in part satisfaction of the claim of the plaintiff under the provisions of Section 61 of the Act.⁴ Debt incurred by the debtor during his minority is not covered.⁵ Similarly, a builder cannot appropriate a tendered sum in discharge of his dues for extra works not authorised in writing by the architect as required under the terms of the given contract.⁶ Where the right of application has devolved upon the creditor, he is not required in law to elect at once the particular debt to be discharged. He may defer the election for the time being.⁷ The creditor can apply the sum even in course of the trial of the suit provided he has not already stated the application in his plaint.⁸ Only when he has applied the sum to the discharge of a particular debt or when a stage has been reached where equity will not allow him to alter the course of appropriation the creditor will be barred from choosing anew the debt to be discharged.⁹ It is not in the power of one of the parties

1. *Corry Brother & Co. v. Mecca*, [1897] A.C. 286 H.L. *Slapney Corpn. v. Osofsky*, [1937] 3 All E.R. 289 C.A.

2. *Wright v. Laing* (1824) 3 B. & C. 165.

3. *Sewsagar v. Satyanarain*, A.I.R. 1960 Patna 145.

4. *Zahiruddin v. Subba Rao*, A.I.R. 1954 Orissa 130.

5. *Keeping v. Broom*, (1895) 11 T.L.R. 595.

6. *Lamprell v. Billericay Union*, (1849) 3 Exch. 283.

7. *Jacob v. George*, A.I.R. 1951 T.C. 80. *Kunjamohan v. Karunakanta*, A.I.R. 1934 Cal 40.

8. *Gajram Singh v. Kalyan Mal*, (F.B.) (1936) 58 All. 791. *Seymour v. Pickett*, [1905] 1 K.B. 715 C.A. *Munuswami v. Perumal*, A.I.R. 1919 Mad. 534 *Kunjamohan v. Karunakanta*, (1933) 60 Cal. 1265.

9. *Seymour v. Pickett*, [1905] 1 K.B. 715 C.A. *Smith v. Betty*, [1903] 2 K.B. 317 C.A. *Corry Brothers & Co. v. Mecca*, *Turkish S. S. (Owners)*, *The Mecca* [1897] A.C. 286 H.L.

to a transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.¹

Payment by joint-debtor with discretion to adjust it against joint-debt extinguishes the same *ipso facto* against all the debtors, and any subsequent arrangement between the creditor and the person paying the sum cannot revive the joint liability.² Until creditor has appropriated, debtor can give intimation of appropriation, and then creditor has no choice. If creditor appropriates and informs debtor, debtor, too, has no choice. Creditor can alter appropriation if debtor is not informed already.³ A sum wrongly appropriated by the creditor to compound interest may be afterwards appropriated to simple interest due.⁴ When the creditor's intention as to the particular appropriation is not known, but its nature as effected is known, it will be so treated.⁵ Once the right of application has been exercised and the debtor has been informed accordingly, the application cannot be altered from one debt to another.⁶ It is generally held that unless communicated by the creditor to the debtor, entries of payments made by the creditor in his books are not binding on the creditor in the matter of election of the application of the sums received in discharge of the debts owing.⁷ In *Deeley v. Lloyds Bank, Ltd.*, [1912] A.C. 756 H.L., it has been observed at pages 783, 784 that if there is nothing more than this, that there is a current account left by the creditor, or a particular account is kept by the creditor, and he carries the money to that particular account, then the Court concludes that appropriation has been made, and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation.

In the absence of an application indicated by the debtor, the devolution of the right of election on the creditor under Section 60 is not affected by the fact that there has been a surety for one of the several debts owing. In the absence of special circumstances, the surety cannot insist on the application of the sum paid in discharge of the debt guaranteed by him. In the absence of an application indicated by the debtor under Section 59, the option of the creditor under Section 60 will prevail over the insistence on the part of the surety.⁸ The creditor has a right to appropriate a payment by the

1. *Mahomed Jan v. Ganga Bishun*, (1911) 38 Cal. 537.

2. *Foster v. Chetty Firm*, A.I.R. 1925 Rang. 4.

3. *Chegganmull v. Manicka*, A.I.R. 1926 Mad. 192. *Rama Shah v. Lal Chand*, A.I.R. 1940 P.C. 63.

4. *Nemi Chand v. Radha Kishen*, (1921) 48 Cal. 839 P.C.

5. *Muni Lal v. Gulab Singh*, A.I.R. 1933 Lah. 126. *Kunjamohan v. Karuhakanta*, (1933) 60 Cal. 1265.

6. *Albemarle Supply Co., Ltd. v. Hind & Co.*, [1928] 1 K.B. 307 C.A. *Smith v. Betty*, [1903] 2 K.B. 317, 321 C.A. *Friend v. Young*, (1897) 2 Ch. 421. *Hooper v. Keay*, (1875) 1 Q.B.D. 178.

7. *London & Westminster Bank v. Button*, (1907) 51 Sol. Jo. 466. *Cory Bros. v. Mecca*, [1897] A.C. 286 H.L. *Simson v. Ingham*, (1823) 2 B. & C. 65.

8. *Re Sherry, London & County Banking Co. v. Terry*, (1884) 25 Ch. D. 692 C.A. *Polmer v. Long*, (1816) 1 Stark. 153. *Kinnaird v. Webster*, (1878) 10 Ch. D. 139. *Pearl v. Deacon*, (1857) 1 De G. & J. 461. *Wright v. Hickling*, (1866) L.R. 2 C.P. 199. *Williams v.*

the interest and the principal of single debt, and may be applied where the debt consists of two definite and specified portions, standing on different footings, and it is possible to treat the two portions of the debt as distinct debts. In the case of a mortgage of joint family property made by the manager, for a debt of which a part only is for legal necessity, if at the time of the mortgage, or at least at the time when a payment is made, it is definitely known that the debt consists of two portions, one of which is binding on the family and the property and the other only on the manager personally, the debtor making a payment can specify to which portion the payment is to be credited, and in the absence of any specification by the debtor the creditor can appropriate the payment towards one or the other portion. But where it is not clearly known and ascertained that the debt consists of two such definite and specified portions, and specially where the mortgagee regards and maintains the entire debt as being one debt binding on the whole family, it is impossible for him to appropriate the payment towards an unknown and unspecified portion of the debt. In such cases no question of appropriation in its strict sense arises, and the payment must of necessity go towards the discharge of the whole debt treated as one single debt, and to be distributed rateably between the two portions as found by the Court.¹

Where a subsequent purchaser of hypothecated properties pays off certain decree debts and mortgage debts of the mortgagor, he cannot claim that only the prior mortgages were fully paid off so as to use them as a shield against subsequent mortgages. In the absence of evidence of such payment, it would be taken that all debts were paid *pro rata* and he would be entitled to only such proportionate amount as would be deemed to have gone towards satisfaction of the prior mortgages and to nothing more.²

Section 61 comes into play when a debtor from whom distinct debts are due makes a payment but neither the debtor nor the creditor has made appropriations. The duty is then cast on the Court to apply the payment in discharge of the debts in order of time and if the debts are of equal standing in discharge of each proportionately. The creditor's right to appropriate the amount or any part of it towards the payment of any debt exists even during the pendency of the litigation concerning the payment right up to the pronouncement of the judgment. Hence, the Court must wait till then before it takes up its duty under Section 61. However, for the duty to be undertaken there must be a litigation concerning the payment. And the two essential requisites therefor are (i) a payment on account and (ii) litigation concerning the same.³

Where several debts were owing to a creditor and he agrees to accept a composition payable by instalments in discharge of the several debts, an instalment paid under the contract is to be taken as a payment made in

1. *Gajram Singh v. Kalyan Mal*, (F.B.) (1936) 58 All. 791.

2. *Rama Krishnayya v. Venkata Somayajulu*, (F.B.) A.I.R. 1934 Mad. 31.

3. *Uthup v. Kathanar*. A.I.R. 1960 Kerala 90.

discharge of all the several debts proportionably.¹

An appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt.² It is duty of the Court, when instalments are paid, to appropriate them to the earliest instalments unpaid.³ When moneys are received without a definite appropriation on the one side or the other the rule which is well-established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital.⁴

Upon taking an account of principal and interest due, the ordinary rule as to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of interest.⁵ Courts appropriate payments made upon a bond first, to the interest due thereon, and thereafter, if any balance remains, to the principal.⁶

Sections 59 to 61 embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him. They do not deal with cases in which principal and interest are due on a single debt, or where a decree has been passed on such a debt carrying interest on the sum adjudged to be due on the decree. The general rule of appropriation of payments towards a debt is that in the absence of a specific indication to the contrary by the debtor, the money is first applied in payment of interest and then when that is satisfied, in payment of the capital. This principle applies even to the sale proceeds of the properties sold in execution of a mortgage decree. Therefore, in the absence of a direction to the contrary in the decree, the sale proceeds of the properties sold in execution of a mortgage decree must be applied first in payment of subsequent interest and costs, and thereafter the balance to discharge the principal sum declared as payable in the decree.⁷ The rule as to making up an account of interest in mortgage cases, viz, that when a payment is made it is to be deducted from the interest, and not from the principal, extends to the execution of ordinary decrees. The balance of interest is never added to the principal so as to produce compound interest.⁸

1. *Thompson v. Hudson*, (1871) 6 Ch. App. 320.

2. *Kundan Lal v. Jagannath*, (1915) 37 All. 649.

3. *Harkisondas v. Nariman*, A.I.R. 1927 Bom. 479.

4. *Venkatadari v. Parthasarathy*, A.I.R. 1922 P.C. 233; (1921) 44 Mad. 570 P.C. *Beninson v. Shiber*, A.I.R. 1946 P.C. 145.

5. *Venkatadri v. Parthasarathi*, (1921) 44 Mad. 570 P.C.; A.I.R. 1922 P.C. 233. *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151; P.C. *Lal Chaudhury v. State of Bihar*, A.I.R. 1952 Pat. 453.

6. *Maharaja of Banarès v. Har Narain*, (1906) 28 All. 25. *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151; P.C. *Lal Chaudhury v. State of Bihar*, A.I.R. 1952 Pat. 453.

7. *Jia Ram v. Sulakhan*, (F.B.) A.I.R. 1941 Lah. 386. *Chaganlal v. Gopilal*, A.I.R. 1954 M.B. 151.

8. *Georoo Doss v. Ooma Churn*, (1874) 22 W.R. 525.

on the circumstances of the case. Thus a contract between a debtor and his creditor that the debtor should sell and the creditor should accept any property in satisfaction of the debt may operate in one of the three ways, namely, (1) the contract by itself may operate as an absolute discharge of the debt, giving the creditor thereafter only the remedy by way of specific performance of the contract, or (2) it may operate only as a conditional discharge of the debt giving the creditor, in case of the debtor's default, a right to claim either performance of the contract or, if he elects to put an end to it, the payment of the debt, or (3) the contract may be an independent transaction in the sense that it does not affect the rights of the creditors or the obligations of the debtor till the sale is actually completed. In which of these ways the contract is to have operation will depend upon the intention of the parties to be gathered, in the absence of any express stipulation, from their conduct and the surrounding circumstances in the particular case.¹

The mere fact that after the father's death the major sons undertook the liability of the father's debts will not detract from the fact that the debts were those of the father unless it is shown that there was a novation and the creditors gave up the liability against the father's assets and looked up for payment only against the sons. It may be that the sons also undertook personal liability though the father's liability remained.²

Section 62 deals with novation of contract. It comes into operation when a new contract is substituted for the contract in existence. For novation under Section 62 consideration is necessary, ordinarily the consideration mutually being the discharge of the old contract.³ Section 62 does not deal with a case of part performance. It deals with a case of novation, that is, where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it and enacts that the original contract need not be performed. But where the parties agree that the old contract should be substituted by a new contract namely by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for the balance and the amount is not paid and the other party does not accept by words or conduct the position as a mortgagee, there is no novation in the eye of the law. The provisions of Section 39 would apply to such a case and the party can fall back on the original contract.⁴ The Madras Agriculturists' Relief Act, 1938, overrides the provisions of the Indian Contract Act, 1872, as regards appropriation.⁵

Substitution.—In the body of Section 62, the word is “substitute” instead of “novation” as in the marginal note. Substitution is novation. The

1. *Todarmal v. Chironjilal*, A.I.R. 1956 M.B. 25 (Gwalior). *Gyarsilal v. Sitacharan*, A.I.R. 1963 M.P. 164.

2. *Kadir Mooral v. Muhammad Koya*, A.I.R. 1956 Mad. 368.

3. *Kedarnath v. Sheonarain*, A.I.R. 1957 Patna 408.

4. *Babulal v. Tuls*, A.I.R. 1940 Patna 121.

5. *Sanyasayya v. Ramareju*, A.I.R. 1962 Andhra 233.

Courts in India being accustomed to use the expression "novation", "substitution" may not be treated separately as such. *See novation*, below.

In *N. M. Firm v. Theperumal*, (1929) 45 Mad. 180, it has been observed that Section 62 does not imply that the substitution, rescission or alteration of a contract after its breach, must be supported by consideration, and that the English doctrine on the subject is not applicable in India. As against this observation it may be submitted that the expression "the original contract need not be performed" in Section 62 sufficiently shows that the question of substitution, rescission or alteration refers to novation, rescission or modification of the original contract before there has been breach thereof. Secondly, it has been seen that novation results in the emergence of a new contract ; and every contract requires some consideration as foundation therefor.

In *Debnarayan v. Chunilal*, (1914) 41 Cal. 137, debtor's liability was acknowledged by another person, and the creditor accepted it. The creditor could enforce the liability against the third person. It was observed that the arrangement between the creditor and the third person did not amount to a novation. It may be submitted that if the three parties agreed and brought about the new contract between the creditor and the third person superseding the original contract between the debtor and the creditor there is no reason why there should be no novation under Section 62. Whether the parties intended to substitute a new contract for the old contract is a question which depends upon the circumstances of each particular case.¹

Effect of substitution.—If the parties to a contract agree to substitute a new contract for it, then only the substituted contract must be performed, and not the original. The net result of the entire transaction is dissolution plus replacement. In cases of collateral contracts, the original contracts, remain operative.²

Where the clause in a settlement in express terms declared that the earlier contracts should be finally concluded in terms of the settlement and no party would have any claim against the other: *Held* that the substituted agreement gave a new cause of action and obliterated the earlier ones.³ Where the original cause of action merged in the ascertained debt, the original cause of action could not be revived.⁴ Where a bond is admittedly executed by the defendant and thereby he has accepted the correctness of the previous accounts, if any, between the parties, it is not open to the Court in suit on the bond to re-open the transaction and to take accounts between the parties except where a mistake or fraud is pleaded or claim for

1. *Kedar Nath v. Kripal*, A.I.R. 1944 Oudh 63.

2. *Kandaswamy v. Sivasubramania*, A.I.R. 1963 Mad. 16.

3. *Union of India v. Kishorilal*, A.I.R. 1959 S.C. 1362.

4. *Sakarchand v. Ismail Hoosin*, A.I.R. 1931 Rang. 189.

re-opening of the transaction is made under any statute.¹

The mere fact of one party alleging that new contract has been substituted for an old one, does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.² Where on a suit for the breach of a contract to sell land, a subsequent contract to sell lands other than those at first agreed upon was executed for the original consideration the original contract as subsequently varied could be enforced.³ A person depositing money cannot question validity of sale and on that ground claim that that money deposited should not be paid to a decree-holder but refunded to him.⁴

Novation.—‘Novation’—a term derived from the civil law—means that, there being a contract in existence, some new contract is substituted for it, either between the same parties or between different parties; the consideration mutually being the discharge of the old contract. A common instance of it, in partnership cases, is where, upon the dissolution of the partnership, the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if they give notice of that arrangement to a creditor and ask for his accession to it, there becomes a contract, between the creditor who accedes and the new firm, to the effect that he will accept their liability instead of the old liability, and, on the other hand, they promise to pay him for that consideration. In order that one liability may be extinguished by being replaced by another by agreement, it is essential that the person in whom the correlative right resides should be a party to the arrangement, or should, at all events, show by some act of his own that he accedes to the substitution.⁵ Novation of a contract comprises two features: the discharge of the debtor and the substitution of a new debtor; the discharge is controlled by the proper law of the contract.⁶

Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. For this new contract the parties may be the same as in the original; or one of the original parties whether the debtor or the creditor may be substituted by one new debtor or creditor. Thus when a promissory note between *A* and *B* is replaced by a mortgage deed between the same parties for the original debt which is thus extinguished by the mortgage deed, it is a case of novation. Again, *A* may owe *B* Rs. 100. and *B* may owe *C* Rs. 100,

1. *Sant Ram v. Nand Lall*, A.I.R. 1955 Pepsu 122.

2. *Roushan Bibee v. Hurray Kristo*, (1882) 8 Cal. 926.

3. *Ramiah Bagawathar v. Somasi Ambalam*, (1915) 29 I.C. 449.

4. *Raghu Ram v. Deokali*, A.I.R. 1928 Patna 193.

5. Stroud : *Judicial Dictionary*, 3d ed., vol. 3, 1953, p. 1931 : *Scarv v. Jardine*, (1882) 7 App. Cas. 345, 351.

6. *In re United Railways of the Havana and Regla Warehouses, Ltd.*, [1959] 2 W.L.R. 251 C.A.; *State of Bihar v. Ram Ballabh*, A.I.R. 1960 Pat. 400.

and if *A*, *B* and *C* may meet and agree that *A* will pay *C* Rs. 100. This new agreement with *A* as the debtor and *C* as the creditor extinguishes the debt of *B* to *C*. This is a case of novation. The extinction of the debt of *B* due to *C* forms the consideration for the new contract between *A* and *C*. Had there been no extinction of *B*'s debt to *C*, the contract between *A* and *C*, would be without any consideration, and would therefore be void, that is, unenforceable.¹

In novation there is not only substitution of some new obligation for the original one but also the intention or *animus novandi*.² Consent of all parties is essential for novation. Novation is a new contract; and there cannot be a contract without consent.³ The necessary consent may be inferred from the conduct of the parties to the new contract.⁴ An advertisement in the press is not sufficient for the Court to presume knowledge and therefore consent in certain circumstances on the part of the parties.⁵ Acts of recognition may lead to the presumption of consent.⁶ Usages or custom of a particular trade or business may also lead to the presumption of consent.⁷

The parties to the new contract may be the same or may include an additional third person.⁸ A mother as legal guardian of her minor son is competent to enter into a new contract renewing certain debts binding on the minor's estate.⁹ The substitution of the original promise by a new one is a sufficient consideration for the new contract to be enforceable.¹⁰ Novation being a new contract, it may be an oral contract even though the original contract was in writing or was required to be in writing, provided however that the new contract itself is not one which is compulsorily required to be in writing. Even where the new contract may adopt some of the provisions of the original one, it is not a variation of the latter, and as such is permissible to be effected orally. The original contract does not exist at all. It is

1. *Scarf v. Jardine*, (1882) 7 App. Cas. 345, 351; *Tallock v. Harris*, (1789) 3 T.R. 174, 180; *Liversidge v. Broadbent*, (1859) 4 H. & N. 603.

2. *Wilson v. Lloyd*, (1873) L.R. 16 Eq. 60, 74; *Rouse v. Bradford Banking Co.*, [1894] 2 Ch. 32 C.A. *affd.* (1894) A.C. 586 H.L.

3. *Wilson v. Coupland*, (1821) 5 B. & Ald. 228, 232; *Wharton v. Walker*, (1825) 6 Dow. & Ry. K.B. 288; *Parker v. Wise*, (1817) 6 M. & S. 239; *Thomas v. Shillibeer*, (1826) 1 M. & W. 124.

4. *Re Towns' Drainage & Sewage Utilization Co.*, *Morton's Case* (1873) L.R. 16 Eq. 104. *Bilborough v. Holmes*, (1876) 5 Ch. D. 255. *Hart v. Alexander*, (1837) 2 M. & W. 484. *Rolfe and the Bank of Australasia v. Flower, Salting & Co.*, (1865) L.R. 1 P.C. 27, 44, 45. *British Homes Assurance Corpn., Ltd. v. Paterson*, [1902] 2 Cn. 404. *Re Family Endowment Society* (1870), 5 Ch. App. 118, 132.

5. *Graham v. Hope*, (1792) Peake 208. *Jenkins v. Blizard*, (1816) 1 Stark. 418. *Hart v. Alexander*, (1837) 2 M. & W. 484.

6. *British Homes Assurance Corpn. Ltd. v. Paterson*, [1902] 2 Ch. 404.

7. *North v. Bassett*, [1892] 1 Q.B. 333. *Johnson v. Raylton, Dixon & Co.*, (1881) 7 Q.B.D. 438 C.A.

8. *Scarf v. Jardine*, (1882) 7 App. Cas. 345, 351.

9. *Bechu Singh v. Baldeo Prasad*, A.I.R. 1933 Oudh 132.

10. *Foster v. Dauber*, (1851) 6 Exch. 839, 851. *Goss v. Nugent*, (1833) 5 B. & Ad. 58, 65.

altogether annulled and not varied.¹ The principle of substitution applies to contracts of service as well.²

Though novation is derived from *novatio*, it is not renewal of an old promise. Renewal generally applies to a transaction which is one with the original obligation including the parties.³ The essence of a novation of contract lies not in the dissimilarity of the terms between the old and the new contract, but in the intention of the parties to supersede the old by the new.⁴ A transaction can be said to be renewed only when it is done by the same debtor. Where the original debtor is given up by the creditor and another person undertakes the liability for a portion of the debt and executes a hypothecation bond, the case is one of novation and the debt cannot be said to have been "renewed, included or merged" in the hypothecation bond.⁵

It has already been noted that Section 62 presupposes that the original contract is still capable of performance.⁶ The provisions of Section 62 do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to.⁷ The term 'novation' implies that there being a contract in existence some new contract has been substituted for it resulting in discharge of the earlier contract.⁸

Novation of contract requires that the new contracting party has consented to assume liability for the new contract and also that the person on whom the correlative right resides has agreed to accept the new party's liability in substitution of the original liability.⁹ Where the parties are the same, the concurrence of both the parties is necessary. Where there are three parties, that is, an additional one, the concurrence of all the three is necessary for the formation of a binding contract.¹⁰ Voluntary covenants of a unilateral character do not of themselves render a deed of contract.¹¹

Goods were insured against war risk without buyer's instruction. The buyer was not obliged to pay for such insurance.¹² An assignment of a

1. *Goss v. Nugent*, (1833) 5 B. & Ad. 58, 65. *Browning v. Stallard*, (1814) 5 Taunt. 450. *Taylor v. Hilary*, (1835) 1 Cr. M. & R. 741. *Anstey v. Marden*, (1804) 1 Bos. & P. N.R. 124.

2. *Hobson v. Cowley*, (1858), 27 L.J. Ex. 205. *Brace v. Calder*, [1895] 2 Q.B. 253 C.A.

3. *Luka Chacko v. Varkey Francis*, A.I.R. 1951 T.C. 182.

4. *Bhabhuti v. Parbati*, A.I.R. 1935 Oudh 366.

5. *Luka Chacko v. Varkey Francis*, A.I.R. 1951 T.C. 182.

6. *Dwarika v. Bagwati*, A.I.R. 1939 Rang. 413. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

7. *Manohur v. Thakur Das*, (1888) 15 Cal. 319.

8. *Vishram Arjun v. Shankariah*, A.I.R. 1957 Andhra 784.

9. *Gobind v. Chhajjan*, A.I.R. 1961 Punj. 202. *Hukumatmal v. Jethanand*, (1944) Kar. 208; A.I.R. 1944 Sind 205.

10. *Gobind v. Chhajjan*, A.I.R. 1961 Punj. 202. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

11. *Provat Kumar v. Commr. of I. Tax*, A.I.R. 1959 Cal. 434.

12. *Nissim Isaac Bekhor v. Sultanali Shastary & Co.*, (1916) 40 Bom. 11.

contract (as distinguished from an assignment of a debt, or other chose in action) to be effectual, must amount to a novation, which requires the assent of the other party to the contract.¹ Although, generally speaking, the benefits of a contract are transferable, its burdens are not. The parties to a contract may agree that one of them should drop out and a third party assume the benefits and liabilities of the contract. The consent of the third party to assume these benefits and liabilities need not be express; it may be inferred from conduct.²

Novation constitutes a good consideration for a fresh promise.³ Where the mortgagee releases a part of the mortgaged property, there is no question of a new agreement or contract between the mortgagee and the mortgagor, and therefore no novation of the contract of mortgage.⁴ The new contract by way of novation, where any, may involve the payment of a reduced amount to the creditor.⁵ See illustration (b) to Section 62. The promise of a partnership may be the consideration for a newly admitted partner acknowledging a particular amount as due from the partnership to a creditor.⁶ Extinction of the earlier obligation is the core of novation.⁷ In order to avail oneself of the plea of novation of contract, there must be present substitution of another contract for the original contract and not a mere agreement to substitute one in future.⁸ The institution must be present and immediate.⁹ Where the original contract stands or is merely re-enforced by a subsequent agreement, there can be no question of novation.¹⁰ A contract by novation requires it as an essential element that the rights against the original contractor shall be relinquished and the liability of the new contracting party accepted in their place.¹¹ Acceptance may be express or implied.¹²

Where the defendant had orally agreed to execute a permanent lease in favour of the plaintiff but subsequently he executed a hand-note in favour of the plaintiff for the amount of money already advanced to him under the oral agreement merely as a collateral or additional security for the money so advanced, there was no novation of contract.¹³

1. *J. H. Tod v. Lakhmidas*, (1892) 16 Bom. 441.

2. *Jairam Valjee v. Iron & Steel Co. Ltd.*, A.I.R. 1940 Cal. 466. *Gyarsilal v. Sitacharan*, A.I.R. 1963 M.P. 164.

3. *Gouri Dutt v. Madho Prasad*, A.I.R. 1943 P.C. 147. *Todarmal v. Chironjilal*, A.I.R. 1956 M.B. 25.

4. *Gobind v. Chhajjan*, A.I.R. 1961 Punj. 202.

5. *Todarmal v. Chironjilal*, A.I.R. 1956 M.B. 25.

6. *Gouri Dutt v. Madho Prasad*, A.I.R. 1943 P.C. 147.

7. *Gobind v. Chhajjan* A.I.R. 1961 Punj. 202. *Hukumatlal v. Jethanand*, (1944) Kar. 208. *Vishram Arjun v. Shankariah*, A.I.R. 1957 Andhra 784. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

8. *Guranditta v. Sant Rani*, A.I.R. 1936 Lah. 476.

9. *Todarmal v. Chironjilal*, A.I.R. 1956 M.B. 25.

10. *Kameshwar v. Shahmat*, A.I.R. 1958 Pat. 162.

11. *Nadimulla v. Channappa* (1903) 5 Bom. L.R. 617.

12. *Gyarsilal v. Sitacharan*, A.I.R. 1963 U.P. 164.

13. *Kameshwar v. Shahmat*. A.I.R. 1958 Pat. 162.

To have novation, the parties to a contract must agree to the extinguishment or discharge of the old debt or obligation. There can be no novation until this has been accomplished. Where a creditor takes a bill, note or cheque in payment, he may either accept it in complete satisfaction of the debt or may accept it as a conditional payment only the effect of which is to suspend his remedies during the currency of the instrument. The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of bill, note or cheque is a conditional payment only.¹ In order to constitute novation, there must be a new contract and not merely a new agreement. That is to say, there must be a new enforceable agreement. If the new agreement is not enforceable there has been no novation.² An unenforceable agreement is no contract at all, and hence such an agreement cannot constitute novation.³ Novation will be there only when the subsequent contract is enforceable.⁴ There can be no novation if the new contract is not a valid one and therefore unenforceable. If the new agreement is in contravention of provisions of any statute and therefore cannot be enforced, it cannot serve as a novation; and the old contract continues.⁵ If by reason of any want of formality such as registration, stamp, etc., the document containing the new contract is inadmissible in evidence or otherwise unenforceable the original contract will still be operative.⁶ Where an award and the decree passed in its terms replaced a mortgage between the parties, but they were not enforceable for want of registration it was held that the mortgagee could fall back upon the original mortgage.⁷

Whether there has been a novation is a matter of construction.⁸ The question whether the parties intended to substitute a new contract for the old is a question of fact in each case depending for its decision in the circumstances of the case.⁹ Whether all rights and liabilities under the old contract have been extinguished by novation is a question of fact depending on the circumstances of each case.¹⁰

Novation and assignment.—In novation the consent of both or all of the parties is necessary. In assignment, where it is allowed, the consent of the other party to the original contract is not essential. An agreement between new and retiring partners without the consent of a creditor of the firm cannot relieve the old firm from liability. The creditor can sue the

1. *Ramdayal v. Maji Devdiji*, A.I.R. 1956 Raj 12.
2. *Shankarlal v. Ambalal*, A.I.R. 1946 Nag. 260.
3. *Abdul Kayam v. Vithoba*, (1912) 14 Bom. L.R. 26.
4. *Guruswami v. Cardamom Co-operative Society Bank, Ltd.*, A.I.R. 1954 T.C. 419; *Sri Bihar v. Ram Ballabh*, A.I.R. 1960 Patna 400.
5. *Pannalal v. Labhchand*, A.I.R. 1955 M.B. (Indore) 49.
6. *Vishram Arjun v. Shankariah*, A.I.R. 1957 Andhra 784.
7. *Shankarlal v. Ambalal*, A.I.R. 1946 Nag. 260.
8. *Dhanpat Mal v. Niamat Rai*, A.I.R. 1933 Lah. 335.
9. *Todarmal v. Chironjilal*, A.I.R. 1956 M.B. 25 (Gwallior).
10. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

members of the old firm with whom he contracted.¹ Even after the formation of a new firm, the creditor may continue to look to the old firm.² Even where an assignment is not allowed, but one has been made and the creditor gives his express or implied assent to the assignment, it will be binding on him.³ If a debtor contracts with a third person that such person shall pay his debt, a creditor not a party to the said contract cannot sue the third person.⁴ Novation in its effect is also an assignment in which all the parties to it give their consent to the substitution of the old contract by it.

Effect of novation.—Novation being the substitution of a new contract for the original one discharges the latter. Novation results in dissolution plus replacement. *A* is indebted to *B*, and *C* is indebted to *A*. All of them agree that *C* shall become *B*'s debtor in place of *A*. Only where *A*'s debt to *B* has been extinguished, *B* can enforce repayment by *C*.⁵ Under Section 63, *infra*, the liability of *C* to *B* in its amount need not be equal to the original liability of *A* to *B*. The rescission of the original obligation forms the consideration for the new obligation.⁶

If the parties to a contract agree to substitute a new contract for it, the original contract need not be performed. *A* owes *B* Rs. 10,000. *A* enters into an arrangement with *B*, and gives *B* a mortgage of *A*'s estate for Rs. 5,000 in place of the debt of Rs. 10,000. This is a new contract and extinguishes the old. *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* and *B* is at an end, and a new debt from *C* to *B* has been contracted and substituted for the original contract between *A* and *B*, both *A* and *B* as well as *C* having agreed to such substitution. *A* owes *B* Rs. 1,000 under a contract. *B* also owes *C* Rs. 1,000. *B* orders *A* to credit *C* with Rs. 1,000 in his book, but *C* does not assent to the arrangement. No contract having emerged between *A* and *C*, there has been no substitution for the original contract between *A* and *B*; and both the contracts, namely, those between *A* and *B* and between *B* and *C* respectively still stand.

Novation and the original cause of action.—Some valuable consideration, even though no adequate, is necessary to found the new contract. Where there has been no consideration, and where there has been dispensation or remission of performance of the original contract by the promisor under Section 63, the original obligation or the original cause of action remains. Sole liability being sometimes more advantageous, the creditor may accept one sole debtor under a new contract for two debtors under the

1. *Kirwan v. Kirwan*, (1834) 2 Cr. & M. 617.

2. *British Homes Assce. Corpn. Ltd. v. Paterson*, [1902] 2 Ch. 404.

3. *Oldfield v. Lowe*, (1829) 9 B. & C. 73.

4. *Price v. Easton*, (1833) 4 B. & Ad. 433.

5. *Cuxon v. Chadley*, (1824) 3 B. & C. 591. *Liversidge v. Brodbent*, (1859) 4 H. & N.

603. *Cochrane v. Green*, (1860) 9 C.B.N.S. 448. *Wharton v. Walker*, (1825) 4 B. & C. 163.

6. *Foster v. Dauber*, (1851) 6 Exch. 839.851. *Goss v. Nugent*, (1833) 5 B. & Ad. 58, 63.

original.¹ But where an arrangement has been made between the parties to a promissory note, without the addition of a new and third party, for the payment of the amount thereof by instalments, there has been no valuable consideration in favour of the promisee, and as such there has been no novation in a legal sense in order to disentitle the promisor to sue on the basis of the promissory note.²

Unless there has been an enforceable contract by way of novation, the original cause of action remains enforceable. A loan could be proved orally when the pronote was held unenforceable because it was unstamped and therefore inadmissible.³ A hundi not sufficiently stamped was given in renewal of a prior hundi. The original cause of action helped the creditor.⁴ In *Ramaswami v. Murugiah*, A.I.R. 1936 Mad. 179, a full bench decision, a promissory note not being duly stamped was not admissible in evidence. The plaintiff was held entitled to fall back upon the original debt. When an instrument intended to constitute a novation becomes invalid or inoperative the rights of the creditor under the original contract remains unaffected.⁵

The giving of a negotiable security may sometimes operate as a conditional payment only and not as a satisfaction of the debt.⁶ An oral promise to pay was followed by execution of a promissory note. The oral promise did not merge in the note.⁷ A suit on a pro-note on an antecedent debt failing, action lay on the original debt.⁸ Where there is an independent admission of a loan, the holder of a hundi, bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.⁹

Promissory notes signed by only one of the partners were accepted by vendor for the value of goods sold to the partnership firm. The vendor brought a suit against both the partners based on the original contract, that is for the price of the goods sold and delivered. Both the partners were held liable.¹⁰

Where defendant borrows money from the plaintiff on the security of promissory note and later the promissory note is renewed by another promissory note which is found to be inadmissible in evidence being

1. *Thompson v. Percival*, (1834) 5 B. & Ad. 925, 933. *Lyth v. Ault*, (1852) 7 Exch. 669.

2. *McManus v. Bark*, (1870) L.R. 5 Exch. 65. *Ramnandan v. Gundu*, A.I.R. 1928 Mad. 1238.

3. *Kunwar Bahadur v. Suraj Bakhsh*, (F.B.) A.I.R. 1932 Oudh 235. *Mohan v. Ramji*, A.I.R. 1931 Nag. 113.

4. *Rahamat Ali v. Dewa Singh*, (1923) 4 Lah. 151.

5. *Gharati Hiracharan v. Kehar Mansaram*, A.I.R. 1937 Nag. 104.

6. *Cullianji v. Raghowji*, *Lakshmi Bai v. Cullianji*, (1906) Bom. 27.

7. *Ananda Namdeo v. Pundalik*, A.I.R. 1936 Nag. 225.

8. *Gulabgir v. Nathmal*, A.I.R. 1932 Nag. 23. *Kandaswamy v. Sivasubramania*, A.I.R. 1963 Mad. 16.

9. *Krishnaji v. Rajmal*, (1900) 24 Bom. 360.

10. *Dargavaram v. Rampratabu*, (1902) 25 Mad. 580.

insufficiently stamped, the plaintiff can fall back on the original promissory note and succeed in his claim, provided the terms of contract are to be found in the older promissory note and subsequent pro-note can be used as an acknowledgment.¹

When a cause of action for money is once complete and the debtor then gives a hand-note to the creditor for payment of the money at a future time, the creditor, if the note is inadmissible, may always sue for the original consideration and parole evidence can be allowed of the transaction.² Where a pronote executed by a person is renewed by him after his adjudication as an insolvent and before he is discharged, the debt due under the pronote being provable in insolvency the renewal of the pronote constitutes a fraud on the insolvency law. Consequently the fact that there were renewals cannot prevent a creditor from suing on the original pronote³ because all transactions between the insolvent and the creditor conducted behind the back of the official assignee and without informing the Court must be considered as null and void.⁴

In *Official Assignee v. Kuppuswami*, A.I.R. 1936 Madras 785, a full bench decision, the original debt agreed to be paid by instalments was subsequently comprised in a promissory note payable on demand. Even though the suit on promissory note was barred by limitation, the plaint was allowed to be amended so as to base the claim on the basis of the original debt because the original debt could be sued upon irrespective of the promissory note and it needed no new facts for its support. A suit brought within three years from the last payment of instalment was in time.

A executed a bond for a debt due by B. But subsequent to this, a settlement was effected by which B was to pay part of debt in certain instalments and execute a mortgage for balance and in default B was to continue to be liable as before. B paid some instalments but failed to carry out the terms of the settlement. A's liability under the bond was absolved by the settlement and it was not revived on B's default as there was no term in the settlement to that effect.⁵ When owing to its invalidity a promissory note cannot be the basis of a suit, the plaintiff can obtain a decree on the basis of the original debt only if the debt has an independent existence apart from the promissory note. When there is no interval of time between the two and the debt itself is evidenced by the note, the plaintiff cannot rely on the debt.⁶

Where A who owed money to B on account of price of paddy supplied to him, gives to B a cheque for the amount due, to be presented at a certain bank on a certain date but the cheque was dishonoured by the bank on presentment after the due date, B could sue upon the original

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1. *Salig Ram v. Radhay Shiam*, A.I.R. 1931 All. 560.
 2. *Dompo Khan v. Agha Arshad Khan*, (F.B.) A.I.R. 1933 Pat. 575.
 3. *Mohana Reddi v. Gangaraju*, (F.B.) A.I.R. 1941 Mad. 772.
 4. *Mohantal Motilal v. Harilal Bhogilal*, A.I.R. 1925 Bom. 346.
 5. *Ram Singh v. Shwip Tek Chand*, A.I.R. 1933 Lah. 464.
 6. *Appalaraju v. Yedukondalu*, A.I.R. 1958 Andhra 713.

consideration and get a decree for the recovery of that amount. When there was nothing to show that *B* had accepted the cheque as a complete and unconditional satisfaction of the dues, the presumption that it was only a conditional acceptance would prevail.¹ Where a cheque drawn by the debtor in favour of his creditor is negotiated with a third party and while it is outstanding in the hands of that third party it cannot be said that the original debt is still outstanding and unpaid.²

A mere extension of time does not operate so as to rescind the original contract.³ The mere execution of a contract of sale for the debt due to the prospective vendee does not discharge the debt.⁴ What is needed or essential for a novation is the wiping out of the original contract as well as the creation of a new valid contract. If the new agreement is held or declared by law to be void, it is not a new contract and therefore it cannot serve as *novatio*, and the original contract continues unless the rights thereunder are expressly abandoned.⁵ Where of two mortgages the latter was executed by way of novation of the earlier and this latter mortgage was partly invalid, the mortgagee was entitled to sue on the earlier mortgaged deed.⁶

A mere executory contract which has to be specifically enforced to procure the contract and which is to be substituted for the old contract, would not supersede a registered mortgage-deed by which an interest in the property has passed.⁷ An accord without satisfaction has no legal effect in discharging a debt. The original cause of action is not discharged so long as the satisfaction agreed upon remains executory. A tender of performance of the consideration is not sufficient unless it can be shown that what the creditor accepted in satisfaction was the debtor's promise and not the performance of that promise. Whether there has been accord and satisfaction is a question of fact.⁸ See below. See also Section 63, below, and also pages 628-631, above.

A mortgage debt or security can be discharged either by the payment of the mortgage or by such other satisfaction as the mortgagee may by a novated agreement allow to the debtor. Where all that the mortgagee had agreed to accept in satisfaction of his mortgage debt was the conveyance of certain lands to him by the mortgagor and not merely the promise to convey the lands, the mortgage security or debt would not be discharged but would remain till either payment in redemption was made or lands were transferred to the mortgagee. In a novation there must be an immediate and present substitution of another contract, and there is no true novation if there is

1. *Abdul Majid v. Ganesh Das*, A.I.R. 1954 Orissa 124.
2. *Ramprosad v. M. P. Patel*, A.I.R. 1942 Cal. 45.
3. *Lachminarain v. Hoare, Miller & Co.*, (1914) 41 Cal. 35.
4. *Rosi Reddi v. Kristna Reddi*, A.I.R. 1944 Mad. 540.
5. *Ganpat v. Mahadeo*, A.I.R. 1925 Nag. 26.
6. *Kanhaiya Prasad v. Hamidan*, [1938] All. 714.
7. *Angan Lal v. Saran Bahari*, A.I.R. 1929 All. 503.
8. *Kandasamy v. Sivasubramania*, A.I.R. 1963 Mad. 16.

reversion to the old contract.¹ Where the new contract is unenforceable, the old one revives.²

Although a mortgagee in a suit on a subsequent mortgage executed in lieu of a prior mortgage cannot set up the prior mortgage yet a fresh promissory note only provides evidence of the original loan and does not extinguish the mortgage.³ Where a mortgagor executes a new and later mortgage deed for consideration comprising the principal and interest due on an earlier mortgage deed and the later mortgage deed is found to be invalid or frustrated wholly or partially through no fault of the mortgagee, the mortgagee is entitled to sue on the earlier mortgage deed.⁴ Where a subsequently executed bond, which substitutes a new contract for the original one though valid at the time of execution is rendered invalid after the execution on account of some material alterations made in it by the plaintiff and a suit on the new bond fails on that grounds, the original contract, which came to an end, is not revived and the plaintiff cannot sue on the original contract.⁵

A contract note relating to shares was originally drawn in plaintiff's favour : he requested appellant *A* to delete his name from the note, and to substitute for it the name of one *H*. The appellant duly did this : and a fresh contract note relating to the shares was made out in *H*'s name, and sent to him by the appellant. *Held*, that the onus of proving that the plaintiff remained liable to appellant in respect of the shares despite the altered terms of contract was on the appellant and that very strong evidence was necessary to show that.⁶ As between a buyer and seller of shares, the buyer is entitled to all dividends declared after the date of the contract for sale, unless otherwise arranged.⁷ Where parties enter into a contract which, if valid, would have the effect by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect of the former transaction. It is only when the second transaction operates as the parties intended that the first transaction can be wiped out.⁸ Where in a suit on the basis of account stated the defence was that the debt was extinguished by the creation of a mortgage of shops and the mortgage failed because there was no registration, there, it was held, no novation of contract within the meaning of Section 62. The second transaction having not operated in the instant case as the parties intended could not by implication

1. *Dadoo v. Venkatrao*, A.I.R. 1954 Nag. 84.

2. *Mahabir v. Satyanarayan*, A.I.R. 1963 Patna 131 ; *Kandaswamy v. Sivasubramania*, A.I.R. 1963 Mad. 16.

3. *Eusof Karwa v. Niemeyer*, A.I.R. 1941 Rangoon 37.

4. *Kannalal v. Bhagwandas*, A.I.R. 1949 Nagpur 5.

5. *Rajdhar v. Mohan*, A.I.R. 1931 All. 325.

6. *Liledhar Nemchand v. Rawji Jugjiwan*, A.I.R. 1935 P.C. 93.

7. *Bank of India, Ltd. v. Jamssetji Chinoy*, (1949-50) 77 I.A. 76 P.C.

8. *Mathura Mohan v. Ram Kumar*, A.I.R. 1916 Cal. 136.

affect the rights of the parties under the earlier transaction.¹

In *Badkulal v. Bhaiya Lal*, A.I.R. 1952 V.P. 58, in the current register of the plaintiff an entry read: "On Bhadon Sudi 2006, the balance of Rs. 34,000 is found payable by Hiralalji made by check and understanding of Hiralalji's books...worked out the accounts, Rs. 34,000 found correctly payable". It was stamped and signed by Hira Lal and Bhaiya Lal. Viewing the document both as an unqualified acknowledgment and as account stated, it was held that it amounted to a new contract and could itself be a cause of action.²

A unequivocal acknowledgment of a debt does involve an implied promise to pay it. If a man unequivocally acknowledges that a debt is due from him, he should be taken impliedly to promise to pay it. Where however he couples his acknowledgment with some expression showing that he was not promising to pay, the case is different. But if there is no qualification, the acknowledgment of the debt should be held to involve an implied promise to pay.³ The phrase "account stated" is a technical one. There are cross-items of account in an "account stated". Such a transaction is bilateral and creates a new debt and a new cause of action.⁴ A mere statement of balance is not "account stated", because "account stated" involves a conscious bilateral process, while a mere statement of balance can be a unilateral admission without one of the parties applying his mind to the accounts.⁵ A mere signature of the debtor under an entry in the creditor's book that a certain amount was found due was not account stated.⁶ The distinction between a mere statement of balance and "account stated" is that in the latter case both the parties apply their minds to the accounts and after striking off the balancing items, arrive at the result that so much is payable by one to the other.⁷

To determine whether an incoming partner becomes liable to an existing creditor of the firm, two questions have to be answered: First, whether the new firm has assumed the liability to pay the debt; and secondly, whether the creditor has agreed to accept the new firm as his debtor and to discharge the old partnership from its liability. A creditor cannot rely merely on an agreement between the partners *inter se* such as that the new partner would be liable for antecedent debts. He must prove novation of contract, that is to say, he must prove both the said conditions in order to hold the new firm liable for his debts.⁸

1. *Chhogalal v. Kanayalal*, A.I.R. 1958 Raj. 303.

2. *Mani Ram v. Roop Chand*, 33 Cal. 1047 P.C.; 33 I.A. 165 P.C.; *Bishun Chand v. Girdhari Lal*, 56 All 376: A.I.R. 1934 P.C. 147.

3. *Shanta Bai v. Trikam Lal*, A.I.R. 1944 Bom. 19: 211 I.C. 115; *Kahan Chand v. Daya Ram*, A.I.R. 1929 Lah. 263: 10 Lah 745; *Punjab Ram v. Jowaya*, A.I.R. 1933 Lah. 47: 141 I.C. 425.

4. *Bishun Chund v Girdhari Lal*, 56 All. 376 P.C.: A.I.R. 1934 P.C. 147.

5. *Gopi Nath v. Chameli*, A.I.R. 1938 All. 504: (1938) All. 741.

6. *Khisty v. Subba Rao*, A.I.R. 1941 Nag. 294: (1942) Nag. 177; *Sham Lal v. Gulabchand*, A.I.R. 1935 Nag. 221: 159 I.C. 447.

7. *Badku Lai v. Bhaiya Lal*, A.I.R. 1952 V.P. 58.

8. *Meenakshi v. Subramanian*, A.I.R. 1957 Mad. 8.

Novation and consideration.—Contracts whose consideration was void have to be distinguished from contracts whose consideration was unlawful or illegal. In the former class of contracts the mere fact that the earlier or the collateral contracts might be void cannot preclude a plaintiff from maintaining an action on a novated contract which is perfectly legal. A novated legal contract, on the other hand, which has for its basis an earlier or collateral illegal contract, cannot be enforced.¹ If the substituted contract is unenforceable, the original contract remains and cannot be extinguished.²

Accord and satisfaction.—There must be a true accord³. To constitute accord, for the purposes of a valid accord and satisfaction settling indebtedness, the agreement constituting the accord must itself be binding in law, and an accord alleged will not be binding where it was neither under seal nor supported by consideration. As it has been observed by Lord Denning, M.R., in *D. & C. Builders, Ltd. v. Rees*, [1965] 3 All E.R. 837 C.A., at page 841, where a creditor agrees to accept, and accepts, from his debtor a lesser sum in discharge of a greater, the creditor will not be allowed subsequently to enforce his legal right to payment of the balance if it would be inequitable for him to insist on that legal right, as for instance, where there has been a true accord between them.

Foreign judgment.—Suit for recovery of debt on original cause of action is maintainable so long as a foreign judgment is not fully satisfied.⁴

Rescission of contract.—Rescission under Section 62 refers to the rescission as made by both the parties to the contract. By a new agreement made between the parties, they may simply rescind the original contract by substituting nothing in its place. The original contract may be thus discharged at any time before its breach. Once the promisor has dispensed with the performance under Section 63, he cannot require the promisee once again to perform the contract on the plea that there had been no basis of consideration for the new agreement dispensing with the performance of the original promise. The parties may also rescind the original contract and substitute a new contract in its place though the latter may contain many of the terms of the former. The onus of justifying rescission is on the party rescinding,⁵ when the rescission is one-sided. A rescission of the original contract may be implied from the conduct of the parties.⁶ Non-insistence for a fairly

1. *Ratan Lal v. Firm Mangilal*, A.I.R. 1963 M.P. 323.

2. *Mahabir v. Satyanarayan*, A.I.R. 1963 Patna 131; *Kandaswamy v. Sivasubramania*, A.I.R. 1963 Mad. 16.

3. *D. & C. Builders v. Rees*, [1965] 3 All E.R. 837 C.A.; see also *Shyamnagar Tin Factory v. Snow White Food Product Co.*, A.I.R. 1965 Cal. 541. See pages 628-631, *ante*. See also under Section 63, below.

4. *O. P. Verma v. Gehrilul*, A.I.R. 1962 Raj 231.

5. *Raghumull v. Luchmondas*, (F.B.) A.I.R. 1917 Cal. 52.

6. *Hunt v. South Eastern Rail. Co.* (1875), 45 L.J. Q.B. 87 H.L. *Dodd v. Churton*, [1897] 1 Q.B. 562 C.A. *Patmore v. Colburn*, (1834) 1 Cr. M. & R. 65. *Thornill v. Neats*, (1860) 8 C.B.N.S. 831.

long time by either party upon the performance,¹ or conduct evinced on the part of the parties which is inconsistent with the continuance of the contract² or acquiescence in breaches³ will enable the Court to infer abandonment.⁴ Rescission of a contract, whether written or parol, need not be express. It may be implied, and it will be implied legitimately, where the parties have entered into a new contract entirely or to an extent going to the very root of the first contract inconsistent with it.⁵

Normally speaking a contract remains in force and terminates strictly in accordance with its terms, express or implied. Provisions as to its duration are to be so construed as to effectuate the mutual intention of the contracting parties as evidenced by the language of the agreement in the light and background of recognised customs, if any, as to the particular nature of the contract. In the absence of any express or implied terms, the conduct of the parties is a fairly safe guide. Generally, all the parties to a contract must assent to its rescission or abrogation and there must be a meeting of their minds in order to accomplish a rescission or abrogation by agreement; one of the parties cannot by himself rescind the contract by merely giving a notice of intention so to do and a contract can only be treated as abandoned when the acts of one party inconsistent with its existence are acquiesced in by the other. But mutual abandonment, cancellation or rescission must be clearly expressed and act and conduct of the parties to this end must be positive, unequivocal and inconsistent with the existence of the contract.⁶

Any right of rescission that a purchaser of goods might have after delivery of the goods to him would be barred by his acceptance of the goods. Apart from special circumstances, the place of delivery of goods sold is the proper place for examination and for acceptance.⁷

Rescission and repudiation.—A simple rescission envisaged under Section 62 is a rescission with the consent of both parties. A mere intimation by one party of his one-sided intention not to perform his promise does not discharge the contract unless the other party elects to treat it as a breach of the contract.⁸ Where one party by conduct shows an intention no longer to be bound by the contract the other party is also justified in regarding himself as freed from the performance.⁹ Where one party has disabled himself from

1. *Davis v. Bomford*, (1860) 6 H. & B. 245. *Pearl Mill Co. v. Ivy Tannery Co.*, [1919] 1 K.B. 78.

2. *Morgan v. Bain*, (1874) L.R. 10 C.P. 15. *Bond v. Walford*, (1886) 32 Ch. D. 238.

3. *Kelsey v. Dodd*, (1881) 52 L.J. Ch. 34.

4. *Fisher (G.W.) Ltd. v. Eastwoods, Ltd.*, [1936] 1 All E.R. 421.

5. *Raghunull v. Luchmondas*, (F.B.) A.I.R. 1917 Cal. 52. *Juggilal v. Internationale Credit*, A.I.R. 1955 Cal. 65. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642.

6. *Sohan Lal v. Banwari Lal*, A.I.R. 1960 Punj. 549.

7. *Long v. Lloyd*, [1958] 2 All E.R. 402 C.A.

8. *Leigh v. Paterson*, (1818) 2 Moore C.P. 588. *Phillipotts v. Evans*, (1839) 5 M. & W. 475. *Heinekey v. Earle*, (1857) 8 E. & B. 410, *affd.*, (1858) 8 E. & B. 427 Ex. Ch.

9. *General Billposting Co. v. Atkinson*, [1909] A.C. 118, 122 H.L. *Boston Deep Sea Fishing v. Ansell*, (1888) 39 Ch. D. 339, 365 C.A. *Freeth v. Burr*, (1874) L.R. 9 C.P. 208, 213. *Morsey Steel and Iron Co. v. Naylor, Benson and Co.*, (1884) 9 App. Cas. 434 H.L.

performing the contract or has repudiated it and the other party has elected to treat the contract as at an end, the latter will get not only damages for the breach of the contract but is also entitled to sue on a *quantum meruit* for what he has done for the other party in course of the contract.

Effect of rescission.—If the parties to a contract agree to rescind it, the original contract, need not be performed. Under Section 62, the earlier promise has been superseded by the latter one.¹ The cause of action in the earlier contract is not suspended pending the performance of the new agreement where any. It is not a case of accord and satisfaction where the accord or the agreement requires satisfaction in the form of a sufficient consideration. Rescission simpliciter results in dissolution simpliciter. As to the consequences of rescission on voidable contract *see* under Section 64, below. As to the rights of a person rightfully rescinding a contract, *see* Section 75, below. As to the mode of communicating or revoking rescission of a voidable contract, *see* Section 66, below. In the absence of stipulations to the contrary, where a contract has been simply rescinded, abandoned, for example, by the parties, the money paid under the contract by one of the parties can be recovered as money had and received.² provided that there has been a total failure of consideration.³

Alteration of contract.—The alteration provided for in Section 62 is in fact substitution. It does not mean variation. In case of variation the original contract as altered, that is, varied, has to be performed. Under Section 62, the original contract being discharged need not be performed. Under Section 1, *ante*, we have seen the effect of alteration where alteration meant the alteration of the instrument of a written contract. Under Section 62 the altered contract is a new contract and not the original contract with alterations. Even where the new contract repeats some of the provisions of the original contract, it is nevertheless a new one, extinguishing the original contract. This is why the so-called altered contract may be made orally in extinction of a contract which was written or which was required under the law to be in writing, provided however that the new contract that emerges, again, is not required to be in writing under the provisions of any law.

Alteration under Section 62 means modification. Where a variation or modification or alteration which is inconsistent with the terms of the contract is made by consent, it amounts to a new agreement which supersedes the original contract.⁴ New position of an employee means the supersession of his previous position under the same employer.⁵ An agreement for separation

1. *Rushbrook v. Lawrence*, (1869) L.R. 8 Eq. 25. *affd.*, 5 Ch. App. 3. *Henderson v. Underwriting and Agency Assn. Ltd.*, [1891] 65 L.T. 732 C.A.

2. *Davis v. Street*, (1823) 1 C. and P. 18.

3. *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452 C.A.

4. *Patmore v. Colburn*, (1834) 1 Cr. M. & R. 65. *Thornhill v. Neals*, (1860) 8 C.B.N.S. 831. *Hunt v. South Eastern Rail. Co.*, (1875) 45 L.J. Q.B. 87 H.L.; *Williams Brothers v. Ed. T. Agills, Ltd.*, [1914] A.C. 510, 527 H.L.; *British and Beningtons, Ltd. v. North Western Cachar Tea Co.* [1923] A.C. 48, 69 H.L.; *Royal Exchange Assce v. Hope*, [1928] Ch. 179, 191 C.A.

5. *Meech v. Port of London Authority*, [1918] 2 Ch. 96, 99, 100 C.A.

it superseded by the wife's reconciliation and return. Acts, orders and regulations may modify the rights and liabilities of the parties to a given contract. Where there are several parties to a contract, it can be varied or modified with the consent of all the parties.¹

Where the plaintiffs entered into a contract with the defendants for the supply of liquor at stipulated rates for 7 years, it is open to the parties to agree to an increase in the agreed rates at any time during the stipulated period even if the plaintiffs had supplied liquor for some time and received payment at the original rates. It cannot be agreed that in respect of the period, short of the full term of the contract, for which the plaintiffs received payment at the original rates for the liquor supplied by them, there was a separate contract which had been completely performed, and that therefore there could be no novation in respect of the rates of liquor supplied during that period.²

There is nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. Thus when an employee of a company by the very terms of his contract of service is to act according to the bye-laws of the Company, and one of such bye-laws is that the bye-laws can be added to or altered at any time by the company, then the employee is bound by any alteration or addition of the bye-laws that may duly be made by the Company even though such addition or alteration is made after the contract of service. This is so even if it means that the employee thereby loses any vested right, that is, any right acquired by him before such alteration or addition.³

Effect of alteration.—If the parties to a contract agree to alter it then only the contract as altered must be performed, and not the original contract. As it has been seen above, alteration under Section 62 means modification of a given contract with a view to creating a new contract superseding the original one. Alteration under Section 62 does not refer to alteration of a document embodying a given contract whether such alteration is material or not, for which see under Section 1, *ante*. Alteration under Section 62 results in dissolution plus replacement.

In *Juggilal v. Internationale Crediet*. A.I.R. 1955 Cal. 65, it has been observed that a mere alteration or modification of the terms of a contract do not amount to its rescission. The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications. It will be submitted that the effect of alterations of a given contract will be determined on the construction of the terms and circumstances of the given case, though Section 62

1. *Hill v. Pattern*, (1807) 8 East 373. *Campbell v. Christie*, (1817) 2 Stark. 64. *Fairlie v. Christie*, (1817) 7 Taunt. 416.

2. *State of M. B. v. Behramji*, A.I.R. 1958 M.B. 71.

3. *Benode v. General Assurance Society Ltd.* A.I.R. 1950 Cal. 232.

envisages a case of alteration where the original contract has been fully superseded.

In *LeGeyt v. Harvey*, (1884) 8 Bom. 501, it was observed that the Indian Contract Act, 1872, gave no larger effect, except by section 108, to a delivery order than it had by English common law. Under Section 90, illustration (c) and Sections 95 and 98, all the three sections now repealed, the giving of a delivery order by a vendor to a vendee did not of itself give the vendee such a possession of the goods as to defeat the vendor's lien. The exception to this rule contained in exception (1) to Section 108, which provides that a seller may give to a buyer, a better title than he had himself where he is by consent of the owner, in possession of the goods or documents relating thereto, cannot be held to apply to cases where the possession is entirely beyond the control of the owner.

Subrogation.—Subrogation in the substitution of another person in the place of a creditor to whose right he succeeds in relation to the debt. Subrogation is the substitution of a new creditor, whereas delegation introduces a new debtor in the place of the former, who is discharged.¹

Under the English law an insurer paying for a total loss in respect of a given property is entitled to be subrogated to all the rights of the assured in respect of the said property. If after receiving full indemnity in respect of a given property, the assured recovers from any third person any sum by way of damages or otherwise in respect of the said property, the insurer is entitled to recover such sum as money received to the use of the insurer.² Where the amount paid by the insurer has not been a payment by way of compensation for the total loss, and the assured receives a sum by way of compensation for loss in excess of the amount paid by the insurer, the rule of subrogation does not apply in favour of the insurer.³ See also under Section 30, *ante*.

Section 62 of the contract Act and the Indian Evidence Act.—In *Sago Rai v. Ramjee*, A.I.R. 1942 Patna 105, it has been observed that an agreement within the terms of Section 62 of the Contract Act to substitute a new contract for existing one or to rescind or alter the existing one is clearly within the terms of Section 92 of the Evidence Act, and cannot be proved by anything other than a registered document. On the other hand, cases which fall within Section 63 of the Contract Act are not agreements varying the original terms or substituting a new contract. In these cases Section 92 of the Evidence Act has no application. A promise to accept a different kind of satisfaction in the future, that is to say, a new agreement within the meaning of Section 62 of the Contract Act is different from the actual remission or

1. Stroud's *Judicial Dictionary*, 3d ed., 1953, vol. 4, 2896; see also *Textiles and Yarn (P.) Ltd. v. Indian National Steamship Co. Ltd.*, A.I.R. 1964 Cal. 362.

2. *Darrell v. Tibbitts*, (1880) 5 Q.B.D. 560 C.A.; *Castellain v. Preston*, (1883) 11 Q.B.D. 380 C.A.; *Dufourcet v. Bishop*, (1886) 18 Q.B.D. 373. *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q.B.D. 226 C.A.; *White v. Dobbinson*, (1845) 5 L.T.O.S. 233. *Horse, Carriage and General Insce Co., Ltd. v. Petch*, (1916) 33 T.L.R. 131.

3. *Burnand v. Rodocanachi*, (1882) 7 App. Cas. 333 H.L.

dispensing with a part of what was promised, that being within Section 63 of the Contract Act.

Section 92 of the Indian Evidence Act, 1872, excludes oral evidence to vary the terms of a written contract. Section 62 of the Contract Act covers cases of substitution, rescission and alteration of the original contract by a new contract which replaces or simply dissolves the earlier one. Both in England and in India in particular cases variations will be allowed only through the medium of writing and not orally. The case of extinction, dissolution or replacement of a given contract stands, both in England and in India on a different footing and is not covered by Section 92 of the Indian Evidence Act, 1872, or the parallel provisions of the English law. Novation and variation are different things. *Sago Rai's* case should be viewed accordingly. Section 62 of the Contract Act does not cover cases of alteration where alteration means alteration or modification *simpliciter* and not dissolution plus replacement. See also *K. S. Narasimhachari v. Indo Commercial Bank, Ltd.*, A.I.R. 1965 Mad. 147.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B* and *B* accepts in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees and *B* accepts them in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B* under a contract a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2,000 rupees, and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a composition of eight annas in rupee upon their respective demands. Payment to *B* of 1,000 rupees is a discharge of *B*'s demand.

Section 63.—In India, as in England, consideration is necessary for the formation of a contract, that is, a binding agreement. See *Chidambara v. P. S. Renga*, A.I.R. 1966 S.C. 193. There are only cases of exception. Section 63 says that a promisee, if he likes, can without any consideration dispense with or remit wholly or partially the performance of the promise already made on the basis of some consideration. The promisee may also extend, at the request of the promisor, the time as originally fixed for the performance. He may also accept a satisfaction altogether different from the one contemplated at the time when the contract was made. Thus a

satisfaction lower in value or different in kind if accepted will discharge the original obligation.

The import of Section 63 is that even though the dispensation with performance or its remission or the extension of time has not been based on any consideration at all, once the favour has been shown to the promisor and accepted by him, it will be binding on the promisee; and he cannot revert to the contract as it was made and bring a suit for its performance according to its import at the time of its formation. If he has accepted a satisfaction lower in its value than the original promise, the accepted satisfaction will extinguish the original promise. The promisee's word is law. Thus one-sided favour once it is shown by the promisee and accepted by the promisor will be binding on the promisee, and the promisor can discharge his obligation accordingly.

In England, under the doctrine of *promise as estoppel*, for which see under Section 2(d), *Consideration*, ante, pages 131-142, when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. A promise not backed with a sufficient consideration though not enforceable at the instance of the promisee is thus not always, even in England, without any legal significance. Such a promise in England, sometimes operates as an equitable estoppel as against the promisor. When one party to a contract in the absence of fresh consideration agreed not to enforce his rights an equity would be raised in favour of the other party. That equity was, however, subject to the qualifications (1) that the other party had altered his position; (2) that the promisor could resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; and (3) the promise only became final and irrevocable if the promisee could not resume his position.¹

As to whether 'irrevocable offer' is a juristic possibility, see *Varty v. The British South Africa Co.*, [1964] 3 W. L. R. 698 C.A.

Section 63 of the Indian Contract Act goes further than the doctrines of waiver and promise as estoppel as obtaining in England. Under the doctrine of promise as estoppel the promise will be binding on the promisor only when the promisee has acted upon the promise and has altered his position. Under Section 36 of the Indian Act once a dispensation or remission or extension of time has been made by the promisee of the original contract and accepted by the promisor, such dispensation or remission or extension of time is irrevocable, even though it was based on no consideration moving in favour of promisee.² Unless the dispensation, remission

1. *Ajayi v. R. T. Briscoe (Nig.) Ltd.*, [1964] 1 W.L.R. 1326 P.C. See also at pages 131-142, ante.

2. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642; *Barhawar, J.*, seems to be confused. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

dispensing with a part of what was promised, that being within Section 63 of the Contract Act.

Section 92 of the Indian Evidence Act, 1872, excludes oral evidence to vary the terms of a written contract. Section 62 of the Contract Act covers cases of substitution, rescission and alteration of the original contract by a new contract which replaces or simply dissolves the earlier one. Both in England and in India in particular cases variations will be allowed only through the medium of writing and not orally. The case of extinction, dissolution or replacement of a given contract stands, both in England and in India on a different footing and is not covered by Section 92 of the Indian Evidence Act, 1872, or the parallel provisions of the English law. Novation and variation are different things. *Sago Rai's* case should be viewed accordingly. Section 62 of the Contract Act does not cover cases of alteration where alteration means alteration or modification *simpliciter* and not dissolution plus replacement. See also *K. S. Narasimhachari v. Indo Commercial Bank, Ltd.*, A.I.R. 1965 Mad. 147.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations

(a) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

(b) *A* owes *B* 5,000 rupees. *A* pays to *B* and *B* accepts in satisfaction of the whole debt 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) *A* owes *B* 5,000 rupees. *C* pays to *B* 1,000 rupees and *B* accepts them in satisfaction of his claim on *A*. This payment is a discharge of the whole claim.

(d) *A* owes *B* under a contract a sum of money, the amount of which has not been ascertained. *A* without ascertaining the amount gives to *B*, and *B*, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

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or extension of time is made conditional on the promisor performing something it will avail the promisor even though he has not yet acted upon it or altered his position on the basis of such dispensation, remission or extension of time. It is needless to say that the remission of performance or extension of time once made by the promisee and accepted by the promisor will be binding on both of them.

In *Chhunna Mal v. Mool Chand*, A.I.R. 1928 P.C. 99, it has been held that the contention that the promisee mentioned in Section 63 can only do the acts he is by that section empowered to do, if there be an agreement as defined by Section 2 (e) amongst the parties to that effect cannot be accepted. The language of the Section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines.

Section 63 lays down the law of waiver. Under this Section neither consideration nor an agreement is necessary to constitute a waiver or dispensation of a promise. The promisee can however dispense with the performance of the promise only by a voluntary and conscious act. It must be an affirmative act on the part of the promisee. A mere omission to assert his right cannot therefore amount to a dispensation within the meaning of Section 63. Even negligence to assert his rights, although it might in certain cases result in an estoppel, cannot possibly amount to a dispensation within the meaning of the Section.¹

Dispensation with performance.—A party to a contract need not perform his promise when such performance has been dispensed with by the other party as the promisee. A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

In England, a contract may be discharged, either wholly or in part, before there has been any breach of it, by a waiver of the right to insist upon its performance. Where there has been a breach of the contract, the right of action which thereupon accrues can be discharged in England by release. Under Section 63 the dispensation gives a greater right to the promisor. In England the waiver is based on fresh contract or estoppel; in India, the dispensation is based on the statutory section of Section 63. The promisor has not to act upon the dispensation or alter his position in order to render the dispensation binding on the promisee. Once it is made by the promisee and accepted by the promisor it is binding on both.

Where it was merely an agreement on the part of the mortgagee to forbear, for a period of four days, from the exercise of the power of sale given by a mortgage and not an extension of time for the performance of the mortgagor's promise to him, which was to pay the mortgage-debt on a certain date, Section 63 did not apply.² There can be dispensation only by means of a promise. There must be a proposal of the dispensation which is ac-

1. *Phoenix Mills, Ltd. v. Dinshaw & Co.*, A.I.R. 1946 Bom. 469.

2. *Trimbak Ganadhar v. Bhagwandas Mulchand*, (1899) 23 Bom. 348.

cepted.¹ For dispensation or remission of contract under Section 63, a new agreement for consideration or a subsequent contract fulfilling all the requirements of a valid contract between the parties is not necessary.²

Section 63 empowers a promisee to dispense with or remit performance of a promise. A release or remission envisaged in Section 63 is not an agreement between two persons. It is a unilateral act of the promisee discharging at his will and pleasure the obligation of another. When the relinquishment is unilateral and comes under Section 63, it is not rendered invalid and inoperative, because it was effected after the payment of mortgage money had become due.³ Under Section 63 promisee can effectually dispense with performance of a contract in whole or in part without either an agreement by the promisor or consideration for the dispensation. Although where there is no actual remission but only an agreement to remit in future, such agreement would have to be supported by consideration, Section 63 contemplates a state of affairs which is prior to the actual performance of the contract. It is open to the promisee to remit a portion of the obligation under Section 63 even though the obligation or the part of the promisor to perform the unremitted part still continues.

Remission of a part without acceptance of the rest would not necessarily amount to an agreement to remit but may amount to actual remission. When there is a dispensation or remission of the performance of the promise either wholly or in part, or when the promisee has granted an indulgence to the promisor by way of extending that time for performance or when any other thing has been accepted as full satisfaction by the promisee, no agreement or fresh consideration is necessary. It is open to the promisee by a unilateral act of grace on his part to absolve the promisor from performance of the obligations. It being a one-sided act on the part of the promisee, Section 92(4) of the Evidence Act cannot be invoked.⁴ Lesser sum if accepted in full satisfaction of a larger one will discharge the debt for the larger sum.⁵

Where a promisee has foregone, under Section 63, his claim under a promise made to him, the amount cannot be claimed even though the act of foregoing was done without any consideration.⁶ Section 60 of the Sale of Goods Act, 1930, gives the buyer when the seller has repudiated the contract of sale before the date of delivery either to treat the contract of sale as subsisting and wait till the date of delivery or treat the contract as rescinded and sue for damages for breach. It is however still open to him to waive the performance of the contract under the provisions of Section 63 of the

1. *Abaji Sistram v. Trimbak Municipality*, (1904) 28 Bom. 66
2. *Hari Krishna v. K. C. Gupta*, A.I.R. 1949 All. 440.
3. *Kedarnath v. Shonarain*, A.I.R. 1957 Patna 408.
4. *Jitendra v. S. N. Banerjee*, A.I.R. 1943 Cal. 181.
5. *Kapurchand v. Himalaya Khan*, A.I.R. 1963 S.C. 250.
6. *Jwala Prasad v. Jwala Bank*, A.I.R. 1957 All. 143.

Contract Act.¹ When a guarantee clause has been waived, the claim on that clause cannot be subsequently sustained.²

Release.—A release will not be construed as applying to facts of which the creditor had no knowledge at the time when it was given.³ A discharge of one of a number of joint debtors by operation of law does not release the others.⁴ Under Section 44 of the Indian Contract Act, a release of one of joint promisors by the promisee does not discharge the other joint promisor or joint promisors. A release given by one of several joint creditors discharges the debt as against all of them.⁵ Thus where there are in a contract several joint debtor and several joint creditors, and one of the joint creditors gives release in favour of only one or a few of the joint debtors, under Section 44 of the Indian Contract Act, the debts subsist as against the remaining joint debtors. When however one of the joint creditors gives a release in favour of all the joint debtors, according to the English common law, the debt will be released even as against all the joint creditors. A covenant not to sue for a limited period on the part of the creditors and in favour of all the joint debtors however will not release the debtors against the remaining joint creditors, because a covenant not to sue for a limited time is not equivalent to a release under the English law.⁶ Where a covenant not to sue is unlimited as to time and unconditional in its terms, it is construed in the English law as a release.⁷ It may be observed, therefore, that where there are several joint creditors and several joint debtors in the same contract, an unconditional covenant not to sue for an indefinite time on the part of one of the several joint promisees but in favour of all the joint debtors will extinguish the debt. Only where one or a few the joint debtors has or have been so released, under Section 44 of the Indian Contract Act, the remaining joint debtors will continue to be bound, and the released debtors will also continue to be bound, under Sections 43 and 44, in their responsibility for contribution to the fulfilling joint debtor or joint debtors.

1. *Kataruka & Sons v. Chaulhai*, A.I.R., 1960 Patna 259.

2. *United Provinces v. The Lower Ganges-Jumna Electricity Distributing Co.*, A.I.R. 1948 P.C. 159.

3. *Ljall v. Edwards*, (1861) 6 H. & N. 337; *Ecclesiastical Commissioners for England v. North Eastern Rail. Co.*, (1877) 4 Ch. D. 845; *Re Armitage*, Ex parte Good, (1877) Ch. D. 45 C.A.; *Re Pekins*, *Poyer v. Beyfus*, [1898] 2 Ch. 182 C.A.; *Londoa and South Wester Rail. Co. v. Blackmore*, (1870) L.R. 4 H.L. 610; *Upton v. Upton*, (1832) 1 Dowl. 400.

4. *Re Garner's Motors, Ltd.*, [1937] Ch. 594; [1937] 1 All E.R. 671.

5. *Ruddock's Case*, (1599) 6 Co. Rep. 25a; *Arton v. Booth*, (1820) 4 Moore C.P. 192; *Wallace v. Kelsall*, (1840) 7 M. & W. 264; *Wild v. Williams*, (1840) 6 M. & W. 490; *Jones and Matthews v. Herbert*, (1817) 7 Taunt 421; *Wilkinson v. Lindo*, (1840) 7 M. & W. 81.

6. *Thimbleby v. Barron*, (1838) 3 M. & W. 210; *Ford v. Beech*, (1848) 11 Q.B. 852 Ex Ch.; *Webb v. Spicer*, *Webb v. Salmon*, (1849) 13 Q.B. 894 Ex. Ch.; *Foley v. Fletcher*, (1858) 3 H. & N. 769; *Morley v. Frear*, (1830) 6 Bing. 547; *Walmesley v. Cooper*, (1839) 11 Ad. & El. 216.

7. *Ford v. Beech*, (1848) 11 Q.B. 852 Ex. Ch.

An instrument in the form of a release may in given circumstances be construed as merely a covenant not to sue.¹ Release conditional on a future event is valid.² Where two parties to a contract settle accounts and release each other from mutual obligations, the point of time at which such settlement and release take place would be the time at which the contract terminates. By payment in full settlement of the final bill such termination would take place.³ Section 63 not only enables a promisee to release a debt at the instance of a third party, but it also enables the promisor whose debt had been released at the instance of a third party to take advantage of that release.⁴ There is no provision in the Indian Contract Act where-under under surety bonds executed by sureties they would stand discharged as soon as the case is transferred to another Court. The principle of equity is neither of any help to the sureties. The sureties bind themselves to present the accused before a Court of law till the conclusion of the trial; consequently, their responsibility continues for so long as the case is pending. By the transfer of the case from one Court to another, the criminal case does not come to an end.⁵

Remission of performance.—*A* owes *B* Rs. 5,000. *A* pays to *B* only Rs. 2,000 and *B* accepts the said sum of Rs. 2,000 in satisfaction of the whole debt of Rs. 5,000. As *B* remits a part of the debt due to him, the debt is discharged. Once a remission has been made by the creditor and accepted by the debtor it is binding on the creditor, though there has been no consideration for this one-sided favour by the creditor in the interest of the debtor. The remission may be in full discharge of the debt or in discharge of only a part thereof. Section 63 provides that no consideration is necessary, not for an agreement to remit, but for an actual remission.⁶ Plaintiff agreed to remit a portion of rent each year and accepted payment at the reduced rate in full discharge in respect of one of the years; the discharge was valid.⁷ What Section 63 permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say, I do not want the rest. You need not pay any more. A discharge extinguishing a debt, though on receipt of a smaller sum than that strictly due, is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. A remission of debt under Section 63 is not an agreement between two persons. It is really the act of one person discharging at his will and pleasure the obligation of another.⁸

1. *Price v. Barker*, (1855) 4 E. & B. 760; *Kearsley v. Cole*, (1846) 16 M. & W. 128.

2. *Mathew v. "Good Will"*, 34 Mad. 156.

3. *Narayana v. Narayanaswami*, A.I.R. 1960 Mysore 150.

4. *In re Industrial Bank of Western India, Ltd.*, A.I.R. 1931 Bom 123.

5. *Inder Singh v. State*, A.I.R. 1960 All. 419.

6. *Balasundara v. Ranganath*, (1930) 53 Mad. 127.

7. *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti*, (1930) 26 Mad. 195.

8. *Balasundara v. Ranganath*, 53 Mad. 127; A.I.R. 1929 Mad. 794.

A remission *in praesenti* which is suspended until a certain future event occurs is valid but an agreement to remit *in futuro* requires consideration if it is to be binding contract. If in a case the plea amounts to an agreement to remit, proof of the agreement is unavailing to the party as the agreement must fail for want of consideration although the agreement may not offend against Section 92, proviso (4) of the Evidence Act, 1872.¹ A remission of a debt *in praesenti* whether in whole or in part which is not a mere promise to remit in the future is valid and does not require consideration.²

For an agreement to remit, consideration is necessary. No consideration is necessary if the decreeholder has actually remitted a portion of the debt due to him and not merely promised to remit it. Actual remission is not completed until he accepts the part payment in full satisfaction.³ Section 63 is not restricted to cases where by remission of payment the whole contract is discharged and extinguished but also applies to any and every occasion in which any sum becomes due and payable under the contract.⁴ Section 63 does not override the necessity for consideration for an enforceable agreement, and deals only with an actual remission of performance. A bare agreement to take less than what is due on a monetary claim (without any actual payment being made) or merely to give time for such payment is void for want of consideration.⁵ There can be remission only by means of a promise. There must be a proposal of the remission which is accepted.⁶ Unless there has been acceptance of the proposal or unless the proposal has been accepted, the promisee cannot be estopped. Oral evidence to prove satisfaction of debt by part payment and remission of remainder is admissible.⁷

Where the landlord demands by a notice a certain amount as rent but the tenant remits by money order a less amount after adjusting a certain amount towards certain payment distinctly stating that he was making the payment in full satisfaction of the rent, and the landlord accepts the payment, it must be deemed that he accepted it in full satisfaction of the rent and he cannot subsequently treat the tenant as defaulter and institute a suit for eviction without obtaining permission of the District Magistrate under Section 3(1) of the U. P. Control of Rent and Eviction Act.⁸ Where the debtors, knowing that the creditors claimed a certain amount, sent them a cheque for a smaller sum, with a condition that it was to be taken as in full satisfaction of the claim, and the creditors cashed it and then wrote

1. *Shanmugasundara v. Sivalinga*, A.I.R. 1952 Mad. 675.
2. *Venkatasami v. Panchakshara*, A.I.R. 1947 Mad. 414.
3. *Ramaswami v. Rudrappa*, A.I.R. 1939 Mad. 688.
4. *Vaidyanatha v. Kandappa*, (1931) 54 Mad. 889.
5. *Maung Pu v. Maung Po*, (1928) 6 Rang. 191.
6. *Abaji Sitaram v. Trimbak Municipality*, (1904) 28 Bom 66.
7. *Collector of Etah v. Kishori Lal*, (F.B.) A.I.R. 1930 All. 721.
8. *Sunder Lal v. Ram Krishan*, A.I.R. 1960 All. 544.

intimating that they did not agree to the condition, it was held that the acceptance of the cheque by the creditors was not a conclusive proof of acceptance of the condition and did not preclude them from suing for the balance of their claim.¹

Where the plaintiffs claimed damages against the Railway Company for the damage done, and the defendant company sent a cheque to the plaintiffs for a sum less than the amount claimed stating that it was in full and final settlement of the claim, the mere fact that the cheque was retained and encashed by the plaintiffs could not be conclusive proof in law that the amount was agreed to be accepted on the condition offered.² Under Section 63 it is open to a promisee to remit his claim in whole or in part even without consideration. But when a person who is on the verge of insolvency purports to make a remission, the validity of that transaction as against the Official Receiver cannot be determined merely with reference to Section 63 of the Contract Act. If the remission was one without consideration, it will be inoperative as against the Official Receiver according to the principle of Section 53 of the Provincial Insolvency Act.³

Extension of time for performance.—When a party forbears at the request of the other to demand performance of a contract at the agreed date it is called in England a waiver. Unless Section 63 of the Indian Contract Act an extension of time though without a consideration is binding upon the promisee as well as the promisor.⁴ For waiver see under Section 37, *ante*.

In England, where one party consents at the request of the other to extend the time for performance, and new arrangement is in fact carried out, the obligation is discharged. In India, once an extension of time for performance has been upon by the promisee at the request of the promisor, the contract then and there stands altered and can be performed accordingly. The effectiveness of the extension is not deferred till the promisor alters his position or discharges the obligation at the postponed date. Where time is of the essence of the promise, but is extended by agreement between the promisor and the promisee, the extension does not operate as an entire waiver of the condition, but merely has the effect of substituting the extended time for the one originally fixed.⁵

Oral evidence is admissible to show that the promisee at the request of the promisor acceded to a delay in performance of a given promise beyond the stipulated time. If the promise has been performed at the extended

1. *Basdeo Ram Sarup v. Dilsukh Rai, Sevak Ram*, (1922) 44 All. 718.

2. *Union of India v. Jethabhai*, A.I.R. 1960 Patna 30.

3. *Narasimharaju v. Official Receiver*, A.I.R. 1940 Mad. 737.

4. *Davis v. Chandasami*, (1896) 19 Mad 398; *Laxmi Narayan Mills Co. Ltd. v. Amrit Lal*, A.I.R. 1964 Bom 76.

5. *Barclay v. Messenger*, (1874) 43 L. J. Ch. 449; *Nokes v. Kilmorey*, (1847) 1 De G. & M. 441; *Bernard v. Williams*, (1928) 139 L.T. 22.

time, the original promise has been extinguished. In the absence of stipulations to the contrary the alteration of time gives birth to a new contract in extinction of the earlier one. In spite of the extension of time, even in the new substituted agreement time may be of the essence of the contract if time was of the essence of the original contract.

Every promisee may extend time for the performance of the contract. Both the parties however must agree to the said extension. It is not open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. The agreement to extend time need not necessarily be reduced to writing. It may be proved by oral evidence. In some cases it may be proved evidence of conduct. Forbearance on the part of the promisee to make a demand for the performance of the contract on the due date as fixed in the original contract may conceivably be relevant on the question of the intention of the promisee to accept the promisor's proposal to extend time. Where the conditions mentioned in the proposal asking for extension of time are so vague and uncertain that it is not possible to ascertain definitely the period for which the time for the performance of the contract has been really intended to be extended, the agreement for extension will be held to be vague and uncertain and as such void under Section 29 of the Contract Act.¹

Section 63 does not entitle a promisee for his own purposes and without the consent of the promisor to extend time for performance which had been agreed to by the parties to the contract.² Under Section 63 the buyer may extend the time of performance. If such extension is not agreed to by the seller, the buyer is not entitled to claim damages for non-performance on the extended date, for the seller is not then bound to deliver on the extended date and the buyer cannot take advantage of his own unilateral act for the purpose of obtaining enhanced damages. Where, however, the extension is agreed to by both parties seller is bound to deliver by the extended date and the buyer is entitled to damages for non-performance on that date.³

In a case falling under Section 63 no fresh consideration is necessary, and provided time is not of the essence of the contract, extension can be granted after the date for the performance of the promise has expired.⁴ An agreement in writing executed along with a promissory note postponing the time for payment is a valid and enforceable agreement.⁵ An undertaking given by a creditor to his debtor not to take steps to recover his debt before the expiry of a certain period is binding on the creditor, and a suit brought before the expiry of the period named must be dismissed as

1. *Keshavlal v. Lalbhai*, A.I.R. 1958 S.C. 512.

2. *Sobhasing v. Nazir*, A.I.R. 1947 Sind 141; *Muthaya v. Lekku*, (1914) 37 Mod. 412.

3. *Aryan Mining v. B. N. Elias*, A.I.R. 1959 Cal. 472, 474.

4. *Mahadeo Prasad v. Mathura Chaudhuri*, A.I.R. 1931 All. 589.

5. *Annamalai v. Velayuda*, (F.B) A.I.R. 1917 Mad. 539.

premature.¹ A mere extension of time does not operate so as to rescind the original contract. The acceptance of part delivery out of time indicates a new agreement between the parties.² A bare proposal merely to give time for payment, unless accepted by the promisor, is void for want of consideration.³

Acceptance of a different satisfaction.—The promisee may accept a satisfaction different in kind or lower in value than the one contemplated at the formation of the contract. Once the promisee accepts such satisfaction in discharge of the original obligation, the obligation is discharged. The promisee cannot again claim on the original cause of action on the ground that he had been a loser by accepting a satisfaction lower in its value. *A* owes *B* Rs. 5,000. *C* pays to *B* Rs. 1,000 and *B* accepts this smaller sum in satisfaction of his claim on *A*. This acceptance on the part of *B* discharges the whole debt owed to him by *A*. *A* owes *B* under a contract a sum of money the amount of which has not been ascertained. *A*, without ascertaining the amount due, pays *B* Rs. 2,000 in satisfaction of the unascertained amount, and *B* accepts the said sum in satisfaction of the sum that might be found due on an ascertainment. The whole debt due by *A* to *B* is thereby discharged. A creditor may accept payment of only a percentage of the debt in satisfaction of the whole of the debt.

Acceptance of a satisfaction different from the one contemplated with a view to discharging the original obligation will discharge the original obligation.¹ This is so under Section 63 of the Indian Contract Act. Where the promisee promises to accept a satisfaction different from the one originally contemplated but has not yet accepted it, Section 63 will not apply. The cause will then be governed by the principles of waiver and promise as estoppel for which see under Section 37 and Section 2(d) respectively. Thus where the promisee consents at the request of the promisor to accept performance in a different mode from the one contracted for and the obligation has in fact been performed in that particular mode, then the obligation of the promisee under the contract is discharged to the extent to which the promisee has waived his rights. Unless the promisor has already performed his obligation in the way agreed upon or has altered his position on the basis of the proposed waiver, he cannot avail himself of a promise to waive. Section 63 as it is deals with present acceptance of a satisfaction and not with the proposal for the acceptance of a different satisfaction. Compliance with a particular stipulation in a contract may be waived by agreement or conduct.⁴ Oral evidence is admissible to show that the promisee at the request of the promisor accepted a substituted mode of performance in extinction of the original obligation. By Section 63

1. *Jugal Kishore v. Chari & Co.*, (1927) 49 All. 599.

2. *Lachminarain v. Hoare, Muller & Co.*, (1914) 41 Cal. 35; *Laxmi Narayan Mills Co. Ltd. v. Amritlal*, A.I.R. 1964 Bom. 16.

3. *See Maung Pu v. Maung Po*, (1928) 6 Rang. 191.

4. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642.

a promisee may accept instead of the performance of the promise made to him any satisfaction which he thinks fit. It is no doubt true that the original cause of action is not discharged so long as the satisfaction agreed upon remains executory but if it can be shown that what the creditor accepted in satisfaction was the debtor's promise and not the performance of that promise, the original cause of action is discharged from the time when the promise was made. Where an agreement has been made the parties after the breach of a contract it may be enforced under Section 63.¹

Where a bill of exchange of a promissory note is given by a debtor to a creditor in satisfaction of his dues, it is presumed to be a conditional payment and in case the creditor is unable to obtain satisfaction on the bill of exchange or promissory note in question, he may fall back upon the original debt and sue to recover the amount. So, where a creditor accepts a cheque in payment of his dues, but is unable to realise the same, it cannot be said that merely because of his acceptance of the cheque, it should be deemed that his outstanding dues have been satisfied and that his right to sue to recover them is barred, except for the right which he may possess to recover damages on account of his failure to obtain payment of the cheque given to him by the debtor. In certain cases however it may well be that the circumstances might suggest conclusively that the acceptance of the bill of exchange or promissory note was in full satisfaction or accord of the creditor's debt in which event the right to sue on the original debt may be extinguished. Similarly, when a draft is issued by a bank payable on its branch at some other place or on some other bank a debit entry is made in the accounts of the issuing bank in advance in anticipation of the fact that the bank draft would be cashed and payment made to the holder at the bank on which it is issued. But, if actually no such payment is made and the draft encashed, the debit entry is accordingly corrected. The mere debit entry in the account of the bank thus does not necessarily amount to payment unless the facts show that the payment has been actually made or other liabilities incurred by the bank in respect of the draft so as to preclude the holder of the draft from recovering the amount.²

Where the original contract containing the arbitration agreement is extinguished by the settlement contract, then if any dispute arises that must be a dispute under the settlement contract and such dispute is not covered by the arbitration clause in the original contract.³

• Accord and satisfaction.—In England a debt or the right of action which arises from a breach of contract may be discharged by a release under seal, for which see under Section 2(h), *ante*. A parol release or waiver without valuable consideration is no bar in England to an action either at

1. *Plasticmoda Societa Per Azioni v. Davidsons (Manchester), Ltd.*, [1952] Ll. L. Rep. 527, 538 C.A.; *Hoentig v. Isaacs*, [1952] 2 All E.R. 176 C.A.; *Dakin (H.) & Co. Ltd. v. Lee* [1916] 1 K.B. 566.

2. *Jamrubai v. Murlidhar*, A.I.R. 1946 Nagpur 148.

3. *Mohan Lal v. Ramlal*, A.I.R. 1957 Assam 133.

law or in equity.¹ If the release is under seal, no consideration is necessary.² A debt of record may be discharged by a release under seal.³ Bill of exchange in England and negotiable instruments in India are also an exception to the rule that there is no release without consideration. In India, again, Sections 62 and 63 of the Contract Act enable the creditor to rescind, substitute or alter a contract or to dispense with its performance or remit the debt without any consideration moving from the debtor.

After a breach of contract has taken place, the cause of action arising from the breach may be discharged by accord and satisfaction. Accord and satisfaction means an agreement between the parties providing for the acceptance by the promisee of something else than the remedy to which the promisee would be entitled in law accompanied with the performance of the consideration agreed upon between the parties.⁴ Accord is the agreement, and satisfaction is the performance of the new consideration agreed upon. Thus, a sheer accord without satisfaction will not extinguish the debt. There will be no discharge of the original debt so long as the consideration in the accord and satisfaction remains partly or wholly executory.⁵ Where however the consideration on each side is an executory promise, the two mutual promises making an enforceable agreement and constituting accord and satisfaction will discharge the original debt.⁶ Where, again, the creditor accepted only the debtor's promise in satisfaction of his debt, the debt is discharged from the time when the promise was made.⁷ Whether an accord has been arrived at is a question of fact.⁸ Thus payments may be received "on account" and not in discharge of the entire debt. Satisfaction not being complete the balance due remains payable.⁹

An accord is not a contract. Accord and satisfaction discharges the debt ; but accord of itself cannot be enforced by action against the debtor because the debtor in the absence of the satisfaction still remains liable on the

1. *Union of India v. B. C. Nawn Ltd.*, A.I.R. 1961 Cal. 620.

2. As to leading cases, see Halsbury's *Laws of England*, 3d. ed., vol. 8, 1954, p. 217, note (a).

3. *Preston v. Christmas*, (1759) 2 Wils. 86.

4. *Barker v. St. Quintin*, (1844) 12 M. & W. 441.

5. *Edwards v. Chapman*, (1836) 1 M and W. 231. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642. *Dipchand v. Abhe Chand & Co.*, A.I.R. 1962 Cal. 166.

6. For English cases, see Halsbury's *Laws of England*, 3d ed., vol. 8, 1954, p. 207, note (1). *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

7. *British Russian Gazette and Trade Outlook. Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616, 644 C.A.

8. *Sibree v. Trapp*, (1846) 15 M. and W. 23. *Flockton v. Hall*, (1849) 14 Q.B. 380, affd., *sub nom. Hall v. Flockton*, (1851) 16 Q.B. 1039 Ex. Ch. *Evans v. Powis*, (1847) 1 Exch. 601. *Morris v. Baron & Co.*, [1918] A.C. 1 H.L. *Elton Cop Dyeing Co., Ltd. v. Broadbent (Robert) & Son, Ltd.*, (1919) 89 L.J. K.B. 186 C.A.

9. *Benning v. Dove*, (1833) 5 C. and P. 427. *Barclay v. Bank of New South Wales*, (1880) 5 App. Cas. 374 P.C.; *Cutts v. Taltal Rail. Co. Ltd.*, (1918) 62 Sol. Jo. 423. *Union of India v. Narayan*, A.I.R. 1963 Patna 152.

original cause of action.¹ Thus a mere tender of performance of the consideration in the accord and satisfaction even if refused will not be sufficient to discharge the original cause of action.² Only in the case of an ascertained sum as the satisfaction in the accord and satisfaction, a tender of payment if refused will discharge the original cause of action. It may be observed that under Section 38 of the Indian Contract Act a plea of tender will be available as a defence to an action only where the tender was made before breach of the contract. Sections 62 and 63 of the Indian Contract Act also refer to substitution, novation, or alteration of contract or dispensation with or remission of its performance before a breach of the contract has arisen.³ See also *Shyamnagar Tin Factory v. Snow White Food Product Co.* A.I.R. 1965 Cal. 541.

Only where there is an element of consideration, that is to say, an executed consideration or an agreement on the basis of mutual promises, the accord and satisfaction will be enforceable by action. A mere accord is not enforceable, because the original debt is still subsisting. But an accord and satisfaction on the basis of some consideration is a binding contract. That is to say, only when the accord and satisfaction satisfies the elements of a binding agreement it will be enforceable, and not otherwise.

Actual waiver of past breaches can be proved whether or not this is in pursuance of a promise to waive. A promise of grace to waive future breaches may be proved but is of no value unless performance has been actually waived. A binding agreement to waive further performance cannot be proved.⁴

Section 62 requires an agreement which necessarily implies consideration. Section 63 does not require an agreement with or without consideration. In *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642, at 644, Bachawat, J., observed that under Section 63, the promisee may after breach, gratuitously release the promisor from his liability arising on such breach. The promisee may also accept instead of performance of the promise such satisfaction as he thinks fit. The correct position seems to be that the principle of Section 63, but not the Section itself, may be applied in the matter of release or so-called accord and satisfaction of the debt occasioned by a breach of contract. That is to say, once the debt has been dispensed with or waived or remitted in full or part by the promisee and such dispensation or waiver or remission has been accepted by the promisor or the proposal of such dispensation, waiver or remission made by the promisor as debtor and accepted by the promisee as the creditor it will be binding on

1. *Ackroyd v. Smithies*, (1885) 54 L.T. 130. *Day v. McLea*, (1889) 22 Q.B.D. 610 C.A. *Nathan v. Ogdens, Ltd.*, (1905) 94 L.T. 126 C.A.

2. *Lynn v. Bruce*, (1794) 2 Hy. Bl. 317. *Bridgman v. Dean*, (1852) 7 Exch. 199. *New Standard Bank v. Probodh*, A.I.R. 1942 Cal. 87.

3. *Gabriel v. Dresser*, (1855) 15 C.B. 622.

4. Bachawat, J., seems to have been confused as to the applicability of Sections 62 and 63 after breach has taken place. See *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642,

both the parties though not based on any consideration as the term 'consideration' is understood in the English Common law.¹

Where for the want of a proposal of dispensation with or remission of an unascertained or ascertained debt and acceptance of such proposal, the principle of Section 63 is found inapplicable, the general principles of release and of accord and satisfaction will be applied. That is so because consideration remains indispensable in cases of contract in general. The accord and satisfaction discharges the causes of action for breaches of contract already committed. Where the accord and satisfaction is by substituted agreement it is a question of construction of that agreement whether it also extinguishes all pre-existing rights and obligations and totally discharges the original contract.² See also under Section 62 above and pages 628-631, above.

Agreement to pay by instalments.—In *McManus v. Bark*, (1870) L. R. 5 Exch. 65, it was held that an agreement made between the parties to a promissory note for payment of the amount thereof by instalments without the addition of any new party was no defence to a claim upon the original note unless there was some valuable consideration other than the agreement to pay the instalments.³ This was so because the English law requires some consideration as the basis for a binding agreement. Under Sections 62 and 63 of the Indian Contract however, any alteration of the original contract or of the mode of its performance if once effected or agreed upon will be binding on both the parties in rescission of the earlier obligation or its mode of performance without any consideration moving from the promisor (of the new obligation) or somebody in his behalf in favour of the promisee (of the new obligation). The terms of the substituted contract will however determine the rights and liabilities of the parties.

Section 63 of the Contract Act, 1872, and Sections 91 and 92 of the Indian Evidence Act, 1872.—In England, the terms of a contract which is required by law to be in writing cannot be varied by a fresh agreement that is not made in writing. This is so even when the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing. Where the original contract is one which is not required by law to be in writing but is nevertheless in writing it can be modified, that is, rescinded by an agreement which need not be in writing. The modification may be oral or implied from course of conduct. Variation has been distinguished from rescission. Where there is a clear intention to rescind, as distinguished from an intention to vary, the original contract though required to be in writing can be rescinded by a new oral agreement.⁴ Variation does not create a new contract which discharges the old

1. *Vaidyanatha v. Kandappa*, (1931) 54 Mad. 889.

2. *Union of India v. Narayan*, A.I.R. 1963 Patna 152.

3. *Union of India v. Kishorilal*, A.I.R. 1953 Cal. 642. *Union of India v. Narayan*, A.I.R. 1963 Patna 152.

4. *Morris v. Barson & Co.*, [1918] A.C. 1 H.L. *British and Benningtons Ltd. v. North Western Cachar Tea Co.*, [1923] A.C. 48, 68 H.L.

ons.¹

Both of the Sections 62 and 63 contemplate the substitution of a new contract in lieu of the old. The old contract being annulled, the new contract does not vary it, even though the new contract may incorporate some of the provisions of the earlier one. Thus even in cases where oral variations are not allowed, oral substitution is not barred. Oral substitution is not allowed in England only where the new contract is, again, one which is required to be in writing. The same is the law also in India.

Under Section 91 of the Indian Evidence Act, 1872, when the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the same Act. See also the exceptions to Section 91.

Section 92 of the Indian Evidence Act, 1872, with some important provisos, lays down that when the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and such terms or the terms of any matter required by law to be reduced to the form of a document, have been proved according to Section 91 of the same Act, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms. Proviso (4) of Section 92 lays down that the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents. A distinct subsequent oral agreement of rescission or modification of an earlier contract should be distinguished from an attempt at varying or modifying by oral evidence the terms of a written contract. Such attempt is not permissible.² See also the other provisos. As to the modes of creation of some rights, see under Section 2(h), *ante*. As to registration also see *ibid*. As to transfer or assignment of rights see under Section 37, *ante*.

As it has been observed in *Subbaraidu v. Mahadeva*, A.I.R. 1965 Andhra 171, Section 63 permits actual remission and not an agreement to remit in future. An agreement to remit in future, in order to be binding, must be supported by consideration. See also *K. S. Narasimhachari v. Indo Commercial Bank, Ltd.*, A.I.R. 1965 Mad. 147.

1. *Royal Exchange Assurance v. Hope*, [1928] Ch. 179 C.A.
2. *Collector of Etah v. Kishorilal*, (F.B.) A.I.R. 1930 All. 721.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Consequences of rescission of avoidable contract.

Section 64.—Section 64 prescribes the consequences of rescission of a voidable contract. Rescission under Section 64 means cancellation or putting an end to a contract and not substitution or substitution and replacement.¹ Voidable contract has been defined in Section 2 (i), *ante*. Under Section 19, *ante*, when consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused. Under Section 19A, *ante*, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Under Section 39, when a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance. A contract valid at its inception may thus be rendered voidable subsequently. Under Section 55, again, failure to perform a promise at the fixed time where time is essential, renders the contract voidable at the option of the promisee. Section 64 does not deal with all the consequences of a voidable contract. It deals with only the consequences of the rescission of a voidable contract. The consequences of rescission of a voidable contract will be treated separately under respective heads.

Effect of rescission of voidable contract.—When a voidable contract is rescinded by the person at whose option it was voidable, the other party as the promisor need not perform his own part.

Restoration of benefit received by the rescinding party.—The party rescinding a voidable contract is required under Section 64 to restore the benefit, as far as may be, to the other party from whom he had received it. Under Section 19A, *ante*, if the contract caused by undue influence is set aside at the instance of the party whose consent to the agreement was caused by undue influence, the court will enable such party to avoid the contract upon such terms and conditions as to the court may seem just, in case he had received any benefit under the voidable contract. Only where he received no benefit, the voidable contract will be set aside absolutely. As it has been observed in *Harihara v. Mathew* A.I.R. 1965 Ker. 187, the right to restoration of benefit is conditional upon rescission by the other party.

The contract which may be put an end to under Section 39 is voidable. The right to recover damages in cases where the contract has been rendered voidable by the wrongful act of a party thereto and has been rescinded by

1. *Etbari v. Ballammy*, A.I.R. 1938 Rang. 207.

the other party accordingly is a right expressly conferred by the statute. But the right to damages is no objection to the application of Section 64 to cases of rescission of contract under Section 39 and a liability to make restitution attaches to the party putting an end to a contract under Section 39.¹ When a party to a contract disables himself from performing the contract or repudiates it, the other party may elect to treat the contract as at an end. In the instant case the party electing to treat the contract as at an end is not only entitled to damages for breach of the contract but may also at the same time sue the other party on a *quantum meruit* for what he has done if he has performed either wholly or in part his own side of the contract.² "Person" and "party" in Section 64 are interchangeable, and mean such a person as is referred to in Section 11 of the Contract Act, i.e., a person competent to contract.³

Where the defendants were not entitled to specific performance, the purchase money was to be returned.⁴ Where the terms of an agreement to sell were not satisfactorily proved and no decree for specific performance could therefore be made, the purchaser was entitled to recover the money which he had paid under the agreement.⁵ Where the defendant was entitled to avoid a mortgage, he was allowed to do so only on the condition of restoring any benefit received by him thereunder. The fact that the person who had received the benefit was the defendant did not alter his position.⁶ Where alienation was to be declared not binding, money must be restored back.⁷

Sections 64 and 65 do not refer by the words "benefit" and "advantage" to any question of "profit" or "clear benefit" nor does it matter what the party receiving the money may have done with it.⁸ The party rescinding a voidable contract is bound to restore only such benefit as he had received "thereunder".⁹ Where a guardian sells his ward's property for purposes not binding on the ward and the sale price is utilised for the purchase of lands for the ward not contemplated at the time of the sale, the lands so purchased for the ward do not constitute the "benefit" within the meaning of Section 64 and need not be conveyed to the vendee from the guardian when the ward avoids the sale by the guardian.¹⁰ In a suit upon foot of a promissory note

1. *Muralidhar v. International Film Co. Ltd.*, A.I.R. 1943 P.C. 34.

2. *Scott v. Pattison*, [1923] 2 K.B. 723. *O'Neil v. Armstrong, Mitchell and Co.*, [1895] 2 Q.B. 418 C.A. *Inchbald v. Western Nilgherry Coffee, Tea and Cinchona Plantation Co.*, [1864] 17 C.B.N.S. 733. *Lockwood v. Levick*, (1860) 8 C.B.N.S. 603. *Hill v. Kitching*, (1846) 3 C.B. 299. *Lodder v. Slowey* [1904] A.C. 442 P.C. *Bush v. Whitehaven Town and Harbour Trustees* (1888) 52 J.P. 392 C.A. *Lines v. Rees*, (1837) 1 Jur. 593. *De Barnardy v. Harding*, (1853) 8 Exch. 822. *Planche v. Colburn*, (1831) 8 Bing. 14.

3. *Brohmo Dutt v. Dharmo Das*, (1899) 26 Cal. 381.

4. *Teju Kaya v. Gangji Nensey and Co.*, (1933) 57 Bom. 292.

5. *Amma Bibi v. Udit Narain*, (1909) 31 All. 68 P.C.

6. *Sinaya v. Munisami*, (1899) 22 Mad. 289.

7. *Mathu v. Sankaran*, A.I.R. 1932 Mad. 303.

8. *Muralidhar v. International Film Co., Ltd.* A.I.R. 1943 P.C. 34.

9. *Bechu v. Bhabhuti*, (1930) 52 All. 831.

10. *Chinnaswami v. Krishnaswami*, (1918) 35 M.L.J. 652.

executed by the defendant while he was a minor, although he misrepresented his age to the plaintiff it was held that the defendant was not estopped from pleading his minority in defence to the suit. Section 41 of the Specific Relief Act, 1877, applied to the case and not sections 64 and 65 of the Contract Act.¹ A mortgage entered into by an infant is not merely voidable but void *ab initio*. Sections 64 and 65 apply only to contracts between competent parties and are not applicable to a case where there is not and could not have been any contract at all.²

The sale made by a step on behalf of her minor son is a sale by an unauthorised person and the minor is entitled to have it set aside. The said sale being void *ab initio* and not voidable, Sections 64 and 65 do not apply. In setting aside a sale made on behalf of a minor by an unauthorised person, however, the Court may under Section 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were benefited.³ In *Raghava v. Srinivasa*, A.I.R. 1917 Mad. 630, a full bench decision, it has been held that a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by other persons on his behalf.⁴

If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to a repayment of the advance made by him.⁵ Where the forfeiture provisions of a contract are not unreasonable in a hire-purchase agreement, the Court will not grant relief to the purchaser. If the defendant (purchaser) fails to surrender the machine to the plaintiff within the time fixed by the Court, the defendant cannot be called upon to pay the value of the machine at the date of the contract plus hire, merely the present value plus hire.⁶ In certain cases, original consideration may furnish cause of action.⁷

Restitution.—Restitution is restoration. For Restoration, *see* Section 65, below. Restitution, *restitutio*, is the yielding up again, or restoring, of any thing unlawfully taken from another. But it is most frequently used in the English common law for the setting him in possession of lands or tenements that hath been unlawfully dispossessed of them.⁸

Whitely Stokes observes that it does not appear what is to happen if restitution is impossible.⁹ The Section envisages a complete restoration of the property itself; failing that, the restoration should be as nearly as possible.

1. *Kanhai Lal v. Babu Ram*, (1910) 8 All. L.J. 1058.

2. *Mohori Bibee v. Dharmodas Ghose*, (1902-03) 30 I.A. 114 P.C. : 30 Cal. 539. *Kamla Prasad v. Sheo Gopal*, (1904) 26 All. 342.

3. *Limbaji Ravji v. Rahu*, (1925) 49 Bom. 576.

4. 33 Mad. 312 overruled.

5. *Anantha Rao v. Surayya*, (1920) 43 Mad. 703.

6. *Subbarayalu v. Annamalai*, A.I.R. 1944 Mad. 526.

7. *Sheikh Akbar v. Sheikh Khan*, (1881) 7 Cal. 256.

8. *Cowel*, cited, *Stroud's Judicial Dictionary*, 3d ed., vol. 3, 1953, 2586. *Wharton's Law Lexicon*, 14th ed., 1953, 877.

9. *Anglo-Indian Codes*, vol. I, 1887, 583.

"So far as may be" in the Section means so far as is reasonably practicable or so far as circumstances admit. When restoration of the property in question is not possible, obviously its monetary equivalent is contemplated. Where a party has rightfully rescinded the transaction without delay he would be entitled in equity to an account of the profits upon the principle of *restitutio in integrum*.¹ *Restitutio in integrum* is the rescinding of a contract or transaction, so as to place the parties to it in the same position, with respect to one another, which they occupied before the contract was made, or the transaction took place.² "Restitution in integrum is a phrase which is properly applied when you wish to express the condition which is imposed upon a person seeking to rescind a contract."³

65. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Obligation of person who has received advantage under void agreement or contract that becomes void.

Illustrations

(a) *A* pays *B* 1,000 rupees in consideration of *B*'s promising to marry *C*, *A*'s daughter, *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1,000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B* in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

(d) *A* contracts to sing for *B* at a concert for 1,000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1,000 rupees paid in advance.

Section 65.—A liability to make restitution attaches to the party putting an end to the contract under Section 39, and if a payment has been made under a contract which has, for whatever reason, become void, the duty of restitution would seem to emerge. A cross-claim for damages, however, stands upon an independent footing, though it arises under the same contract and can be set off.⁴ Natural justice rather than an implied contract is

1. *Salgur Prasad v. Har Narain*, (1932) 7 Luck. 64 P.C. See also *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145; *Adam v. Newbigging*, 13 App. Cas. 308.

2. As to the *restitutio* on the praetor's edict, see Wharton's *Law Lexicon*, 14th ed., 1953, 877.

3. See *per* Lord Dunedin in *Admiralty Commrs. v. S. S. Valeria*, [1929] 2 A.C. 242.

4. *Harischandra v. Murlidhar*, A.I.R. 1957 M.B. 53; *Union of India v. Bungo Steel Furniture (Pt.) Ltd.*, A.I.R. 1963 Cal. 70.

accepted, in these days, as the basis of the philosophy of restitution.¹ As to quasi-contracts, *see* under Section 73, *post*.

Where a contract becomes impossible of performance, the plaintiff will be entitled to the restitution of the monies paid to the defendant in pursuance of the contract.² Where policy was vitiated by suppression of material facts, the Court will not entertain an action for money had and received; nor will it apply Section 64 or 65 of the Contract Act.³ As it has been observed in *Joginder Singh v. Assistant Registrar, Co-operative Societies, Jammu*, A.I.R. 1965 J. & K. 39, Section 65 does not apply to a contract where parties know it to be void at the time of entering into it. *See* also the cases relied on. *See* also below.

Advantages received under a void agreement.—When an agreement is discovered to be void or becomes void, a party who has received any advantage under the agreement will be required to restore it; or to make compensation for it to the party from whom he received it.⁴ *A* pays *B* Rs. 1,000 in consideration of *B*'s promising to marry *A*'s daughter *C*. *C* was however dead at the time of the promise. The agreement is therefore void. *B* must repay *A* the amount of Rs. 1,000. *See* also instructions (c) and (d) to the Section. Under Section 65, advantage is that benefit which a party has received in course of the transaction which is delivered to have been void or which becomes void subsequently. Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of 'profit' or 'clear profit', nor does it matter what the party receiving the money may have done with it.⁵ Section 65 contemplates a benefit, again, an item of property which has gone into the hands of the other party. Unless it can be said that the defendants came into possession of something tangible from the plaintiff the plaintiff cannot succeed. The word *restore* is significant. The Section does not contemplate reparation for any loss sustained by one party but only restoration of any benefit which has accrued from the one to the other.⁶

Where Section 65 applies, the benefit received from the contract must be restored or compensation made for it. But this principle cannot be extended to properties purchased from the consideration of a void contract.⁷

"'Advantage' includes any office, or dignity, and any forbearance to demand any money or money's worth or valuable thing—and includes any

1. *Moses v. Macferan*, (1760) 2 Burr. 1005; *Arab Bank, Ltd. v. Barclays Bank*, [1953] 2 Q.B. 527; [1954] A.C. 495; [1953] 2 All. E.R. 263 C.A.

2. *Kannappa v. Karupiah*, (F.B.) A.I.R. 1962 Mad. 240.

3. *Mithoolal v. L. I. Co.*, A.I.R. 1962 S.C. 814.

4. *Gulabchand v. Fulbai*, (1909) 33 Bom. 411. *Municipal Board v. Debi Das*, (1926) 1 Luck. 444. *Man Singh v. Khazan Singh*, A.I.R. 1961 Raj. 277. *Uttam Chand v. Mohandas*, A.I.R. 1964 Raj. 50.

5. *Murlidhar v. International Film Co. Ltd.*, A.I.R. 1943 P.C. 34.

6. *Krishna Rao v. Kodandarama*, A.I.R. 1960 Andhra 190. *Uttamchand v. Mohandas*, A.I.R. 1964 Raj. 50.

7. *Mathuraba v. Ramkrishna*, A.I.R. 1961 Bombay 97.

aid, vote, consent, or influence, or pretended aid, vote, consent, or influence—and also includes any promise or procurement of, or agreement or endeavour to procure, or the holding out of any expectation of, any gift, loan, fee, reward, or advantage as before defined.”¹ Commodities, emoluments, profits and advantages imply things gainful.²

Relief for restitution arises under equity.³ Section 65 only codifies the rule of equity which is otherwise well known.⁴ The obligation to pay compensation or to restore the benefit received under a void agreement is completely different from that under the agreement itself. The cause of action under Section 65 cannot exist side by side with the cause of action under the contract itself.⁵ Section 65 applies to agreements which have been void from their inception as well as to contracts which became void subsequent to their making. When the contract is void because prohibited by statute the Court has power to work out the equities and place the parties upon terms.⁶ Sometimes a distinction is made between contracts which are void *ab initio* and those which are intrinsically not so, but are found to be void for other collateral reasons. Thus a contract with the Government, municipality or other corporations which is discovered to be void for failure to comply with the statutory requirements is governed by Section 65. The fact that it is possible for the plaintiff in a given case to proceed against the officer acting as the agent of the Government, municipality or corporation does not deprive him of the right to restitution which he may claim under Section 65. He may not be compelled to enforce the agreement only against the agent.⁷ The Supreme Court of India in *New Marine Coal Co. v. Union of India*, A.I.R. 1964 S.C. 152, following *State of West Bengal v. B. K. Mondal*, A.I.R. 1962 S.C. 779, has however held that in the instant cases only Section 70 of the Indian Contract Act will apply and not Section 65 thereof.

Contracts that are void from their inception come within the scope of Section 65.⁸ A contract void *ab initio* is no contract but only an agreement not enforceable at law.⁹ Section 65 should not be read as if the person

1. *Public Bodies Corrupt Practices Act*, 1889 (52 and 53 Vict., c. 69) S. 7, cited, Stroud : *Judicial Dictionary*, 3rd ed., 1952, 78-79.

2. *London v. Sothwell*, Hob. 304.

3. *Manmaha v. Exchange Local Co. Ltd.*, A.I.R. 1936 Cal. 567. *Municipal Committee, Kishangarh v. Maharaja Kishangarh Mills Ltd.*, A.I.R. 1961 Raj. 6. *Laxmidas v. Jyotsnaben*, A.I.R. 1954 Kutch. 7. *Uttamchand v. Mohandas*, A.I.R. 1964 Raj. 50.

4. *Punjab Government v. Baij Nath*, A.I.R. 1945 Lahore 164.

5. *New Churulia Coal Co. v. Union of India*, A.I.R. 1956 Cal. 138. *Ganga Trading Co. v. United Commercial Bank, Ltd.*, A.I.R. 1957 Tripura 37. *Dharmeswar v. Union of India*, A.I.R. 1955 Assam 86.

6. *Asaram v. Ludheswar*, (F.B.) A.I.R. 1938 Nag. 335.

7. *Dharmeswar v. Union of India*, A.I.R. 1955 Assam 86.

8. *Abhi Singh v. Daso Bhogta*, A.I.R. 1952 Patna 455. *State of Madras v. Mehta*, A.I.R. 1964 Mad. 508.

9. *Sadhusingh v. Jhamandas*, A.I.R. 1937 Sind. 211. *Sunderlal v. Laxmanprasad*, A.I.R. 1949 Nagpur 292.

making restitution must actually have been a party to the contract, but as including any person whatever who has obtained any advantage under a void agreement.¹ Where in a contract of mortgage, the consideration failed *ab initio* Section 65 applied.² Some of the marriage brokerage agreements may be highly immoral, obnoxious and repulsive, while others, though not enforceable, not so bad. Where an arrangement is neither immoral nor criminal and the marriage has not been performed, the money advanced will be refunded.³ If illegal contract is totally unperformed, a party can recover money paid thereunder. If however the plaintiff seeks to enforce the illegal contract, he cannot recover what he has paid thereunder at any rate in the same suit.⁴ The defendant in consideration of Rs. 100 promised to give his minor daughter in marriage to the plaintiff; the defendant failed to fulfil his part of the promise. The plaintiff could recover the amount.⁵ Where parties are not *in pari delicto* and the contract is void under Defence of India Rules, the money is to be refunded.⁶

No warranty of title is there in a Court sale. But the judgment debtor having had no salable interest in the property sold, suit by auction-purchaser for refund of purchase-price after confirmation is maintainable. The suit is for money had and received on a total failure of consideration.⁷ An auction-purchaser in a revenue auction for arrears of *abkari* dues is entitled to recover the purchase money on the ground of failure of consideration when it turns out that the defaulter had no title to the property. But where there is no total failure of consideration by reason of two different properties having been sold in one lot for a single consideration and the defaulter being formed to have title in one of them unless the consideration is severable the purchaser would not be entitled to a proportionate refundment of the money.⁸ If the judgment debtor had some interest in the property auctioned the sale must stand.⁹

Where the title to the subject of the lease was not free from reasonable doubt, and so the lease could not be taken, the *selami* paid could be recovered and not forfeited.¹⁰ Where a mortgagor seeks to recover possession of property from a mortgagee under a void mortgage he can do so only on payment of the mortgage money.¹¹ A mortgage of joint family property

1. *Girraj Baksh v. Hanud Ali*, (1887) 9 All. 340
2. *Javerbhai Jorabhai v. Gordhan Narsi*, (1915) 39 Bom. 358.
3. *Sonphula v. Gansuri*, A.I.R. 1937 Patna 330.
4. *Hirjee Deiraj and Co. v. Maung Nyun*, A.I.R. 1925 Rang. 49.
5. *Ram Chand v. Audaita*, (1884) 10 Cal. 1054. *Srinivasa v. Sesha*, (1918) 41 Mad. 197.
6. *Ram Singh v. Jethanand*, A.I.R. 1964 Raj. 232; see the cases referred to.
7. *Varkey Mathai v. Oommen*, A.I.R. 1963 Kerala 148; *Sachindra v. G. P. & Co.*, A.I.R. 1964 Orissa 269; *Thakar Lal v. Nathu Lal*, A.I.R. 1964 Raj. 140.
8. *Bappu Rawther v. State of Kerala*, A.I.R. 1964 Kerala 109.
9. *Narasim v. Narasayya*, A.I.R. 1945 Mad. 363. *Nagalinga v. Guruswami*, A.I.R. 1930 Mad. 856.
10. *H. V. Low & Co. Ltd. v. Jyotiprasad Singh Deo*, (1932) 59 Cal. 699 P.C. *Mathu v. Sankaran*, A.I.R. 1932 Mad. 303.
11. *Gauri Shankar v. Nathu Lal*, A.I.R. 1951 All. 589.

by the *Karta* without legal necessity and not for discharging an antecedent debt, is void from its inception and not merely voidable, and therefore under Section 65, the mortgagor is bound to repay the loan as soon as the agreement is discovered to be void.¹ Where the mortgage of a minor's estate by the guardian was not void, but the guardian had not obtained the permission required by Section 29 of Act VIII of 1890, the minor's estate was held liable to the extent the minor had in fact benefited by the money borrowed.² Where the terms of the agreement to sell could not be satisfactorily proved and therefore no decree for specific performance could be made, the plaintiff was entitled to get back the money which he had paid under agreement.³ A mortgage was void under the Punjab Tenancy Act, 1887; the mortgagee was entitled to sue the mortgagor for refund of the mortgage money.⁴ In cases of a void mortgage which under the law could not be a mortgage, the mortgagor is entitled to recover possession subject to payment of the money received from the mortgagee, and no question of limitation arises in the case. The possession of the mortgagee is permissible possession and the only right he has is to be allowed to claim the money which the mortgagor had received from him.⁵ Money deposited as security for performance of a wagering contract is recoverable.⁶ This is of course subject to a special statutory law to the contrary. See under S. 30, *ante*. Original consideration may sometimes serve as the cause of action.⁷ A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced. If however society pays the money on the basis of such a contract, it can be recovered on the principle that the obligee at the time of taking the money made an implied contract to repay it.⁸

The legal effect of executing negotiable instruments is generally that of actual payment.⁹

Under Section 118 of the Negotiable Instruments Act, 1881, until the contrary is proved there will be presumption of consideration for every negotiable instrument. See Section 43, *ibid*. When money or other valuable consideration passes and a negotiable instrument is given in exchange for that consideration, a cause of action arises on the consideration apart from the engagement induced by the instrument. The plaintiff can have his money back though the document is inadmissible in evidence on the ground that

1. *Shambhoo v. Dhaneshwar*, A.I.R. 1927 Oudh 177. *Harnath v. Indar Bahadur*, 50 I.A. 69; 45 AH. 179; A.I.R. 1922 P.C. 403.

2. *Tejpal v. Ganga*, (1903) 25 All. 59.

3. *Udit Narain v. Muhammad Minatulla*, (1903) 25 All. 618.

4. *Labh Singh v. Jumnun*, (F.B.) (1934) 15 Lah. 751.

5. *Kaushal Singh v. Ghansham Singh*, A.I.R. 1965 All. 639. *Mahabal Singh v. Ram Raj*, (F.B.) A.I.R. 1950 All. 604.

6. *Srikakolapu v. Gudivada*, (1918) 34 M.L.J. 561.

7. *Sheikh Akbar v. Sheikh Khan*, (1881) 7 Cal. 256.

8. *Nabi Baksh v. Muhammadi*, A.I.R. 1929 Lah. 330.

9. *Ranchod v. Madhava*, A.I.R. 1955 T.C. 144. *Krishnan v. Lakshmi*, A.I.R. 1950 T.C. 73.

it is insufficiently stamped. Under Section 91 of the Evidence Act it is only the terms of a contract with reference to the money that would be precluded from being proved. Section 91 of the Evidence Act is no bar to the plaintiff succeeding on a non-contractual basis, that is, in an action for money had and received by the defendant for the plaintiff's use.¹ In a number of cases, on the other hand, it has been held that if the promissory note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. Section 91 of the Evidence Act, and Section 35 of the Indian Stamp Act bars the way. Whether a suit lies on the debt apart from the instrument, therefore, depends on the circumstances under which the instrument was executed.²

The provision of Sch. III, Para. 11 (i) of the Code of Civil Procedure, 1908 is positive and mandatory, and a sale taking place without the written permission of the Collector is void, and the fact that after the execution of the sale deed the decretal amount was paid to the decree-holder and the Collector set aside the auction sale on the decree-holder's certifying satisfaction of the decree cannot amount to an implied permission of the Collector. Section 68 of the Contract Act applies to such a case and the vendee is entitled to compensation.³ Where a contract is frustrated Section 65 will apply.⁴

Where Section 65 does not apply.—Section 65 starts from the basis of there being an agreement or contract between competent parties and has no application to a case in which there never was and never could have been any contract.⁵ Where a person purported to contract on behalf of a minor but was not competent to do so, there was no contract in law, nor could there have been a contract between the parties so circumstanced, and to such a case Section 65 has no application. Section 65 does not provide for an equitable relief in such cases.⁶ A contract with a minor being void *ab initio*, no cash payment made to him under such a contract is recoverable from him.⁷ The Indian Contract Act makes it essential that all contracting

1. *Jamal Sahab v. Munwar Begum*, A.I.R. 1964 Andhra 189; for cases and discussion see author's *Indian Stamp Act*, 1899, 2nd ed., 1963, sub Section 35. See also vol. 2, under Section 73, *Cases of quasi-contract*, for a support of this view.

2. *Perumal v. Kamakshi*, A.I.R. 1938 Mad. 785 (F.B.); for cases and discussion see author's *Indian Stamp Act*, 1899, 2nd ed., 1963, sub Section 35. See also vol. 2, under Section 73, *Cases of quasi-contract*, for a criticism of this view.

3. *Audesh v. Rajeshwari*, A.I.R. 1951 All. 630.

4. *Parshotam v. Batala Municipality*, A.I.R. 1949 E.P. 301.

5. *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P.C.; (1902-03) 30 I.A. 114 P.C. *Motilal Mansukhlram v. Mansukhlram v. Maneklal Dayabhai*, (1921) 45 Bom. 225. *Jhari Coal-field Electric Supply Co. Ltd. v. Kaluram*, A.I.R. 1951 Patna 463. *Jethalal v. Laxmanwal*, A.I.R. 1953 Sau. 177. *Ajudhia Prasad v. Chandan Lal*, (F.B.) A.I.R. 1937 All. 610. *Kamla Prasad v. Sheo Gopal*, (1904) 26 All. 342. *Bapulal v. Laxmi Bharat Trading Co.*, A.I.R. 1966 Raj. 14.

6. *Kalipada v. Purnabala*, A.I.R. 1948 Cal. 269. *Nathu v. Balwantrao* (1903) 27 Bom. 390. *Sec Dyaviah v. Shivamma*, A.I.R. 1959 Mysore 188; *Parbhu Mal v. Babu Ram*, A.I.R. 1926 Lah. 159. *Khan Gul v. Lakh Singh*, (F.B.) A.I.R. 1928 Lah. 609.

7. *Tikki Lal v. Komalchand*, A.I.R. 1940 Nag. 327.

parties should be competent to contract, and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. Where he purports so to do, his alleged contract is void; and neither Section 64 nor Section 65 can apply to it. He cannot be compelled, except in the discretion of the Court exercised under Section 41 of the Specific Relief Act, 1877, to repay any moneys which he has received in respect of it.¹ On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.² A mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by other persons on his behalf.³ Section 65 is applicable to cases where the contract has been discovered to be void because one of the parties to the contract was incompetent to contract except with the permission of the Collector and also where the subject-matter of the contract was incapable of being bound by the contract.⁴ Section 65 does not apply where a defendant being of unsound mind was incompetent to contract.⁵

The incapacity imposed on a judgment-debtor by para. 11 of the Third Schedule of the Code of Civil Procedure is an incapacity to affect his property and not a general incapacity to contract, and the covenant to repay is not made void by the mere operation of the said paragraph. The lender who has agreed to make a loan upon security and has paid the money is not obliged to continue the loan as an unsecured advance. The borrower is bound to restore the advantage received by him and to make compensation for it to the lender from whom he received it.⁶ In order to invoke Section 65 the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof.⁷ It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e., without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of Section 65 is that, in such a situation, it enables a person not *in pari delicto* to claim restoration. The party is only seeking to be restored to the *status quo ante*. Section 65 does not recognise the distinction between a contract being illegal by reason of its

1. *Mohori Bibee v. Dhurmodas Ghose*, (1902-03) 30 I.A. 114 P.C. : *Mohori Bibee v. Dharmodas Ghose*, (1903) 30 Cal. 539 P.C. *Nottingham Permanent Benefit Building Society v. Thurston*, [1903] A.C. 6. *Limbaji Ravi v. Rahi*, (1925) 49 Bom. 576. *Dattaram v. Vinayak*; *Ramchandra v. Vinayak*, (1904) 28 Bom. 181. *State of Bihar v. Dukhlulal*, A.I.R. 1962 Patna 140.

2. Section 41 of the Specific Relief Act, 1877.

3. *Raghava v. Srinivasa*, (F.B.) A.I.R. 1917 Mad. 630.

4. *Ram Nagina v. G. G. in Council* A.I.R. 1952 Cal. 306.

5. *Punjabhai v. Bhagwandas*, (1929) 53 Bom. 309.

6. *Raja Mohan Manucha v. Manzoor Ahmand*, A.I.R. 1943 P.C. 29; 1943 All. L.J. 421; *Baburam v. Ganga Devi*, A.I.R. 1954 All. 788.

7. *Dyavaih v. Shivamma*, A.I.R. 1959 Mysore 188. *Ram Nagina v. G. G. in Council*, A.I.R. 1952 Cal. 306.

being opposed to public policy or morality or a contract void for other reasons. Even agreements, the performance of which is attended with penal consequences, are not outside the scope of Section 65. At the same time Courts will not render assistance to persons who induce innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong.¹

Provisions of Section 65 apply to a case only if the parties are competent to contract and the agreement, though void from its inception, is discovered, after they have acted on the faith of it to be not enforceable by law. It has no application where the parties, though competent to contract were *in pari delicto* and they knew the unlawfulness of the agreement before they acted on it. Nor does it apply where the object of the agreement was illegal to the knowledge of both parties and they acted on it or derived benefit therefrom.² Section 65 does not apply when the object of the agreement is illegal to the knowledge of both parties at the time when it was made.³ The Section does not apply to contracts into which persons deliberately enter, knowing that the contract cannot have any validity and is in express contravention of the rules and restrictions imposed on them.⁴ When in *Kalikumari v. Manomohinee*, (1936) 63 Cal. 445, it had been observed that money paid under an agreement the consideration or object of which was illegal, immoral or against public policy could not be recovered the decision should be construed in the light that the illegality of the object or consideration was presumed to have been known to the parties at the time of the conclusion of the agreement.⁵

Section 65 may in conceivable cases cover of agreements which are void *ab initio* when there has been some misapprehension; but it does not apply to agreements not only void *ab initio* but known to be so from the beginning and *a fortiori* to agreements of a fraudulent nature involving moral turpitude on the part of the parties to it. Hence, where an agreement between the parties creates false evidence to defeat the succession of real owner of the property and also purports to compound a non-compoundable case, no suit lies under Section 65 to recover any money paid in pursuance of the contract and the plaintiff is not entitled to any relief.⁶

An auction purchaser in execution sale is not entitled to recover back the purchase money from the decree-holder after the confirmation of sale if it is

1. *Sivaramakrishnaiah v. Narahari*, A.I.R. 1960 Andhra 186. *Sriramulu v. Deputy Registrar of Co-operative Societies*, (1957) 2 Andh. W.R. 226 : 1957 Andhra L.T. 607—overruled. *Parbhu Mal v. Babu Ram*, A.I.R. 1926 Lah. 159.

2. *Jharia Coal-field Electric Supply Co. Ltd. v. Kaluram*, A.I.R. 1951 Patna 463. *Parbhu Mal v. Babu Ram*, A.I.R. 1926 Lah. 159. *Khan Gul v. Lakha Singh*, (F.B.) A.I.R. 1928 Lah. 609.

3. *Nathu v. Sewak*, (1910-11) 15 C.W.N. 408.

4. *Gopalaswami v. Annandana Kattalai*, A.I.R. 1940 Mad. 719.

5. *Ram Nagina v. G. G. in Council*, A.I.R. 1952 Cal. 306 ; *Ledu Coachman v. Hiralal*, (1916) 43 Cal. 115.

6. *Rudragowda v. Gangowda*, A.I.R. 1938 Bom. 54 ; *Purkayastha v. Union of India*, A.I.R. 1955 Assam 33. *Ledu Coachman v. Hiralal*, (1916) 43 Cal. 115.

discovered that the judgment-debtor has no salable interest in the property, merely only ground of such discovery.¹ If the contract was really a wager, the deposit could not be recovered under Section 65, as its nature from the first, have been known to the parties.²

The benefit contemplated by Section 65 must be received before the agreement is discovered to be void, or before the contract becomes void. Any advantage received thereafter would not be covered by the Section, because after the agreement or contract ceases to be enforceable and is found to be void, any advantage received is not within the terms of the agreement or the contract in question.³ If facts and circumstances in the case prove that the parties discovered the illegality subsequently and not at the time of entering into the agreement, Section 65 becomes applicable.⁴ The ordinary presumption that the parties knew the law may be rebutted by the special circumstances in a case if it is proved as a fact that the parties were under a misapprehension as to their rights and did not know in fact that the agreement which they had entered into was void by reason of a statutory provision of which they had no knowledge or apprehension.⁵

When the illegality of the contract has been made to appear, the law will not extend its aid to either of the parties who will be left to abide the consequences of their own act. There are however exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to perform his part of the agreement. Where money had been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it strictly or to recover the value of services rendered under it or money paid on it.⁶ Where an agreement entered into by the agent on behalf of his principal with a third person is not only void but is also illegal and is declared an

1. *Thakarlal v. Rama*, A.I.R. 1961 Raj. 193. See however *Bappu Rawther v. State of Kerala*, A.I.R. 1964 Kerala 109; *Varkey Mathai v. Oommen*, A.I.R. 1963 Kerala 148; *Narasingi v. Narasayya*, A.I.R. 1945 Mad. 363; *Nagalinga v. Guruswami*, A.I.R. 1930 Mad. 856, above.

2. *Davabhai v. Lakhmichand*, (1885) 9 Bom. 358.

3. *Municipal Committee, Kishangarh v. Maharaja Kishangarh Mills Ltd.*, A.I.R. 1961 Raj. 6. *Ram Nagina v. Governor-General in Council*, A.I.R. 1952 Cal. 306, *affd. sub nom. Union of India v. Ram Nagina*, 89 C.L.J. 342 : A.I.R. 1955 N.U.C. 506 Cal. *Purkayastha v. Union of India*, A.I.R. 1955 Assam 33. *Dynviah v. Shivamma*, A.I.R. 1959 Mysore 188.

4. *Budhulal v. Deccan Banking Company Ltd.*, (F.B.) A.I.R. 1955 Hyd. 69.

5. *Ram Nagina v. G. G. in Council*, A.I.R. 1952 Cal. 306.

6. *Ledu v. Hiralal*, 43 Cal. 115 : A.I.R. 1916 Cal. 226 : 29 I.C. 625 : 19 C.W.N. 919 : 21 C.L.J. 537. *Ram Nagina v. G. G. in Council*, A.I.R. 1952 Cal. 306, *affd. sub nom Union of India v. Ram Nagina*, 82 C.L.J. 342 : A.I.R. 1955 N.U.C. 506 Cal. *Kalikumari v. Manomohini*, (1936) 63 Cal. 445. *Shyam Sunder v. Lakshmi Narain*, A.I.R. 1961 All. 347 (Luck.) *Narsingh v. Narayan*, A.I.R. 1925 Nagpur 119. *Nathu Khan v. Sewak*, 15 C.W.N. 408 : 9 I.C. 161. *Chennayya v. Janikamma*, A.I.R. 1944 Mad. 415.

offence, the agent's agreement with the principal for commission and indemnity becomes tainted with illegality.¹

Section 65 comes into play only when the agreement is discovered to be void or when the contract becomes void. Therefore, an agreement which is in the nature of a bribe offered by the plaintiff to the defendant to secure a job is at its inception void as being opposed to public policy, and Section 65 does not apply to such an agreement.² No suit will lie to enforce any agreement to pay money in consideration of arranging marriage between parties but not on account of expenses. But if what had been contemplated had been actually performed, no suit would lie to recover the sum advanced. But if it does not take place, money advanced can be recovered under Section 65 even though the agreement is void *ab initio*.³

In *Govind Singh v. Vali Mohammad*, A.I.R. 1951 Hyderabad 44, a suit was filed on the basis of a promissory note and two other chits. The defendant raised an objection that under the (Hyderabad) Money-Lenders' Act V of 1349 Fasli (1940-41 A.D.) the plaintiff's suit could not be maintained as he should have obtained a licence before he lent the money. The objection was upheld and the suit was dismissed. Subsequent to the dismissal of the suit the plaintiff obtained a licence and brought a fresh suit on the basis of the same promissory note and the two chits. The original Court dismissed the suit on the ground that the principle of *res judicata* applied and the second suit could not be filed on the same promissory note and the two chits. In a second miscellaneous appeal Naik, C. J., and Ansari J. of the Hyderabad High Court held that, besides the principle of *res judicata* applicable in the case, a contract made by a money-lender who had failed to register himself under the Hyderabad Money-Lenders Act was illegal and void, and as such he could not recover the money lent on the basis of such a contract. It was further held that the money-lender was not entitled to the restoration under Section 66 of the Hyderabad Contract Act (corresponding to Section 65 of the Indian Contract Act) of the money lent. A contract which was not in accordance with the statutory requirements was not a contract at all, their Lordships held, and did not become void and was not discovered to be void in the sense of Section 65 of the Indian Contract Act. See however, *Budhulal v. Deccan Banking Company, Ltd*, (F.B.), A.I.R. 1955 Hyd. 69.

A contract by a Hindu to sell immovable property to which he is the then nearest revisionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him is void. The Transfer of Property Act, 1882, Section 6(a), which forbids the transfer of expectancies would be futile if a contract of the above character was

1. *Karamchand v. Parekh Lavji*, A.I.R. 1251 Kutch 50.

2. *Ranjeetsingh v. Ramlal*, A.I.R. 1951 M.B. 113.

3. *Alsidas v. Punamchand*, A.I.R. 1944 Nagpur 159.

enforceable.¹ The agreement to sell the right of reversioner is void from its inception, because its subject-matter is incapable of being bound by sale.²

Where a document has been materially altered by the plaintiff and the contract in question thus rendered void, Section 65 will not apply.³ Where property has been taken away in exercise of the right of the State to acquire property, and a lessee evicted by an Act of the Legislature, a valid contract made between the lessor and the lessee may subsequently become void in terms of Section 65. The lessor cannot be sued by the lessee for disturbance of possession. The lessor is bound to refund the consideration.⁴ Where property was sold in court auction subject to a charge for maintenance and maintenance was paid by the buyer, he had no cause of action against the judgment debtors who were originally bound to pay the maintenance.⁵ Money paid under claim in legal proceedings is not ordinarily recoverable.⁶

Where in a suit for recovery of balance, in respect of transactions entered by the plaintiff with a third person, arrived at after appropriating to the losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under Section 65. But where the plaintiff has applied the amount or has become legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of Section 65. The fact there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the liability to the third person in carrying out the defendant's instructions.⁷ Where policy was vitiated by suppression of material facts, the Court will not entertain an action for money had and received; nor will it apply Section 65 or 64 of the Contract Act.⁸ Where contract was not tainted with illegality Section 65 applied for the return of the deposit money.⁹ Judgment-debtor having no salable interest the auction-purchaser was entitled to a refundment of the price paid.¹⁰

Compensation for advantage received under void agreement.—

Compensation is making things equivalent, satisfying or making amends. When an agreement is discovered to be void or when a contract becomes void,

1. *Ananda Mohan v. Gour Mohan*, (1823) 50 Cal. 929 P.C. : A.I.R. 1923 P.C. 189.
2. *Harnath Kuar v. Indar Bahadur*, A.I.R. 1922 P.C. 403.
3. *Kameswararao v. Hemlathammaraao*, A.I.R. 1959 Andhra 596.
4. *Singhai Shrinandanlal v. Laxman Singh*, A.I.R. 1959 M.P. 315.
5. *Mangalathammal v. Narayanaswami*, (1907) 17 M.L.J. 250.
6. *Jyoti Prashad v. Kumud Nath*, (1918) 35 M.L.J. 347 P.C.
7. *Harjivanlal v. Radhakishan*, A.I.R. 1938 P.C. 4.
8. *Mithoolal v. L. I. C.*, A.I.R. 1962 S.C. 814.
9. *National Chamber of Commerce, Ltd. v. Nitya Nandan*, A.I.R. 1963 All. 294 (wager).
10. *Mathai v. Oommen*, A.I.R. 1963 Ker. 148.

a party receiving an advantage from the other party is required to restore it to him. See illustration (a). In case restoration is not possible, sufficient compensation has to be made to him in lien of the advantage received.

The word 'compensation' for an advantage in Section 65 appears to be a contradiction in terms, since compensation connotes a measure of loss or damage and not the value of advantage. In Section 56 the expression used is 'compensation for any loss' and under Section 64 the party rescinding the contracts is to restore any 'benefit'. Under Section 65 the alternatives are to restore any advantage or to make compensation for it to the person from whom he received it. This must mean valuing or quantifying in money the advantage retained, if retained it be. When under Section 65 a party or parties became bound to restore to the other any advantage which the restoring party or parties had received under the contract, the advantage where retained has sometimes to be calculated on the basis of a variety of factors.¹

Discovered to be void.—A contract though void, that is, unenforceable, even at the time when it was made may not be known to be such. Subsequently, it may come to the knowledge of the parties that the contract was void *ab initio*. See illustration (a).

Section 65 deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) of Section 2, an agreement not enforceable by law is said to be void. An agreement discovered to be void is one discovered to be not enforceable by law, and on the language of the Section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement to sell the right of reversioner is manifestly void from its inception, because its subject-matter is incapable of being bound by sale.² Where an agreement was in contravention of the policy of Agra Tenancy Act, 1901, it was illegal and void.³

Where the vendor had only an expectancy and as such his transfer was not effectual, the money received by him for the ineffectual transfer was recoverable by the purchaser with interest from the date of the suit, the period of limitation not running until the rights of the purchaser were discovered to be unenforceable.⁴ When a transaction can be said to have been discovered as void is a matter of fact.⁵

1. *Govindram Seksaria v. Edward Radbone*, A.I.R. 1948 P.C. 56.

2. *Harnath Kuar v. Indar Bahadur*, A.I.R. 1922 P.C. 403 (Sir Lawrence Jenkins); *Dyaviah v. Shivamma*, A.I.R. 1959 Mysore 188; *Ram Nagina v. G. G. in Council*, A.I.R. 1952 Cal. 306; *Jijibhai v. Nagji*, (1909) 11 Bom. L.R. 693.

3. *Moti Chand v. Ikram-Ullah*, (1917) 39 All. 173 P.C.

4. *Harnath Kunwar v. Indar Bahadur*, (1923) 15 All. 179 P.C. *Harnath Kuar v. Indar Bahadur*, (1922-23) 50 I.C. 69 P.C. : A.J.R. 1922 P.C. 403.

5. *Mohan Manucha v. Manzoor Ahmad*, (1943) 18 Luck. 130 P.C. 70 I.A. 1 : A.I.R. 1943 P.C. 29 : (1922-23) 50 I.A. 69 P.C. (Sir Lawrence Jenkins). See also below.

A contract by a Hindu to sell immovable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon in possession, and to transfer it upon possession accruing to him, is void. The Transfer of Property Act, 1882, Section 6(a), which forbids the transfer of expectancies would be futile if a contract of the above character was enforceable.¹ The time at which such an agreement is "discovered to be void", so that a cause of action to recover the consideration arises under Section 65 of the Contract Act, in the absence of special circumstances, is the date of the agreement.

A right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. A defendant who when sued for the money lent pleads that the contract was void can hardly regard with a surprise a demand that he restore what he received thereunder.² Where the mortgagee in his suit on the mortgage asks for a repayment of the amounts due on the mortgage and a sale in default of it and also for such further and other relief as the Court might think fit, and the suit for sale is dismissed, the Court has power to make order for repayment.³ If there are sufficient materials on record, pleadings under Section 65 are not always necessary for a relief thereunder.⁴

In the absence of special circumstances, the time at which an agreement is discovered to be void so as to give rise, under Section 65 of the Contract Act, to a right of suit to recover consideration paid under the contract, is the date of the agreement.⁵ On a suit to enforce a registered mortgage it was found that the mortgage was void because the necessary permission of the Collector had not been obtained under para 11 of the Third Schedule to the Code of Civil Procedure. The mortgagee also formally abandoned his claim on the personal covenant contained in the mortgage deed. *Held*, that the mortgagee had the right to refuse to be bound by the contract of loan when the basis of the contract was gone, and, having done so, could recover the money advanced as a matter of restitution. Accordingly, the security not having been discovered to be void in the special circumstances of the case until after the suit was instituted, no question of limitation arose, and the mortgagee could be given relief under Section 65 of the Contract Act.⁶

Where the duty of observing the law was firmly placed by the law on the

1. *Annada Mohan v. Gour Mohan*, (1923) 50 Cal. 929 P.C. : A.I.R. 1923 P.C. 189 ; *Hansraj Gupta v. Dehra Dun Mussorie Electric Transway Co. Ltd.*, A.I.R. 1933 P.C. 63 ; *Gulam Husain v. Jakirali*, A.I.R. 1939 Nag. 27 ; *Gopilal Bhawaniram v. Pandurang*, A.I.R. 1926 Nag. 241.

2. *Mohan Manucha v. Manzoor Ahmad*, A.I.R. 1943 P.C. 29 : (1943) 18 Luck. 130 P.C. : 70 I.A. 1 (Sir George Rankin).

3. *Nisar Ahmad v. Mohan Manucha*, A.I.R. 1940 P.C. 204 (the Rt. Hon'ble M. R. Jayakar).

4. *Uttamchand v. Mohandas*, A.I.R. 1964 Raj. 50.

5. *Hansraj Gupta v. Official Liquidators*, (1932) 54 All. 1067 P.C.

6. *Raja Mohan Manucha v. Manzoor Ahmad*, (1942-43) 70 I.A. 1 : A.I.R. 1943 P.C. 29.

shoulders of the landlord for the protection of the tenant, and the appellant and the respondent were not therefore *in pari delicto* in receiving and paying respectively the illegal premium, which, therefore, in accordance with established common law principles, the respondent was entitled to recover from the landlord. The omission of a statutory remedy did not, in cases of this kind, exclude the remedy by money had and received. It is not correct to say that everyone is presumed to know the law. The true position is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*.¹

In *Jogesh Chunder v. Kali Churn*, (1878) 3 Cal. 30, a Full Bench decision, "In a suit by the present defendant against the present plaintiff for enhancement of rent, the Courts of first instance and the High Court made decrees for enhanced rent. The Privy Council, in the year 1873, reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered and the fixed rent which he was bound to pay". Macpherson, Maikly and Ainslie, J.J., held that the decrees for enhanced rent were superseded, and that the suit would lie. Gaith, C. J., and Jackson, J., held, on the other hand, that the decrees were not superseded, and that the plaintiff was not entitled to recover. It may be submitted that the minority view is correct, because there was no void contract in the instant case and as such Section 65 would not apply. Where the decree for rent under which the plaintiff's property was sold was unreversed, he was not entitled to recover compensation on account of the sale of his property even though the rate of rent fixed by the Collector was wrong.² Where an agreement was discovered to be void, Section 65 applied.³

Section 55, para. (2) of the Transfer of Property Act, 1882, imports an implied warranty of title in a contract of sale even though there is no express warranty. The clause, however, does not apply to cases where there is a clear contract between the parties to the contrary.⁴ Where a transfer is set aside under Section 53 of the Transfer of Property Act, the case is governed by Section 65 of the Contract Act, and the transferor is bound under Section 65 to restore to the transferee, the price that he has received in respect of the transfer.⁵

V died, and plaintiff, his nephew, claimed from defendants the amount due under the policy. Defendants refused to pay on the ground *inter alia* that the

1. *Kiriri Cotton Co. Ltd. v. Ranchhodas Dewuni*, [1960] W.L.R. 127 P.C.

2. *Kishen Sahai v. Bakhtawar Singh*, (1898) 20 All. 237.

3. *Haribhai v. Nathubhai*, (1914) 38 Bom. 294. *Mukat Nath v. Shyam Sunder*, (1929) 27 All. L. J. 801.

4. *Gwasha Lal v. Kartar Singh*, A.I.R. 1961 J. & K. 66.

5. *Parasharam v. Sadatheo*, A.I.R. 1936 Nag. 268.

policy had been obtained by fraudulent misrepresentation as to the age, means and circumstances of the assured. The defendants were not liable on the policy. The plaintiff was not entitled, under Section 65 to a refund of premia paid on the policy during the life time of the assured.¹

Agency is a matter of contract. Where the manager was not an agent of the owner, the owner was entitled to recover, the earnest money paid to the third person by his manager.² The alienees, the transfers in whose favour had been annulled, under Sections 36 and 37 the Provincial Insolvency Act might prove as unsecured creditors in the insolvency of the alienor to the extent of just debts.³

Government, corporations, etc. as a party and Section 65.—Under Section 11, *ante*, under the head "*The Government*", we have seen that the provisions of Article 299 of the Constitution are mandatory and not directory. A contract which does not comply with the formalities prescribed by Article 299 is unenforceable in law.⁴ Whatever the difference of opinions in the earlier decisions, it later became a settled rule of law that a contract with the Government, municipality or other corporations which is discovered to be void for failure to comply with the statutory requirements is governed by Section 65 of the Contract Act.⁵ In the case of a statutory person who is incompetent to make any contract except in compliance with the formalities prescribed by the statute, there is no inherent disqualification or incompetency to make a contract as in the case of a minor or lunatic. In the case of a contract by such a statutory person the applicability of Section 65 of the Contract Act is not barred.⁶ In *Municipal Board v. Bachchu*, A.I.R. 1951 All. 736, a Lucknow full bench decision, it had been observed that Section 65 applies to a case in which an agreement entered into by a statutory body is invalid by reason of non-observance of statutory provisions with regard to

1. *Oriental Govt. Security Life Assurance Co. Ltd. v. Narasimha Chari*, (1902) 25 Mad. 183.

2. *Kerala Valley Tea Co. Ltd. v. Lachmi Narayan*, A.I.R. 1939 Cal. 14.

3. *Devi Dial v. Sundar Das*, (1919) 54 Punjab Record No. 65 (Civil).

4. *Damodar v. Union of India*, A.I.R. 1959 Cal. 526. *Chatturbhuj v. Moreshwar*, [1954] S.C.R. 817; A.I.R. 1954 S.C. 236.

5. *Asaram v. Ludhereshwar*, [F.B.] A.I.R. 1938 Nag. 335; *Dharmeshwar v. Union of India*, A.I.R. 1955 Assam 86; *Purkayastha v. Union of India*, A.I.R. 1955 Assam 33; *Mohamod Rowther v. Tinnevely Municipal Council*, A.I.R. 1938 Mad. 746; *Madura Municipality v. Alagirisami*, [1939] Mad. 928; *Raman v. Kumbakonam Municipal Council*, (1907) 30 Mad. 290; *Akshoy v. Tollygunge Municipality*, 46 C.W.N. 393; *Ranendra v. Dhuliyani Municipality*, A.I.R. 1956 Cal. 203; *Arunachala v. Srivilliputtur Municipal Council*, (1935) 58 Mad. 65; *Md. Ebrahim v. Commissioners for the Port of Chittiangong*, (1927) 54 Cal. 189; A.I.R. 1927 Cal. 465; *Hindustan Construction Co. v. State of Bihar*, A.I.R. 1963 Patna 254; *Sankaran v. State of Kerala*, (F.B.) A.I.R. 1963 Kerala 278; *State of Madras v. Periaswami*, A.I.R. 1963 Mad. 154; (*Union of India v. Gilkan & Co.*, A.I.R. 1962 Punj. 423 does not allow the plaintiff to avail himself of Section 65).

6. *Ram Nagina v. Governor-General in Council*, A.I.R. 1952 Cal. 306, *affd.*, on appeal *sub-nom.* *Union of India v. Ram Nagina*, 89 C.L.J. 342; A.I.R. 1955 N.U.C. 506 Cal.; *Municipal Committee, Kishangarh v. Maharaja Kishangarh Mills, Ltd.*, A.I.R. 1961 Raj. 6; *Mathura Mohan v. Ram Kamar*, (1916) 43 Cal. 790; *State of Bihar v. Dukkhalal*, A.I.R. 1962 Patna 140.

the execution of contracts but does not apply when these provisions refer to the capacity of the statutory body to enter into an agreement.¹ Where it was found that the mandatory provisions of Section 175 (3) of the Government of India Act, 1935, were not observed and that therefore the plaintiff could not recover on the basis of the contract, it was held that the plaintiff was not entitled to recover compensation under Sections 65 and 70 of the Contract Act when he had received sufficient compensation for the benefit or advantage, if any, received by the Government.² In *New Marine Coal Co. v. Union of India*, A.I.R. 1964 S.C. 152, the Supreme Court of India following *State of West Bengal v. B. K. Mondal*, A.I.R. 1962 S.C. 779, has however held that in the instant cases only Section 70 would apply and not Section 65.

It is needless to point out that the applicability of Section 65 is something distinct from the non-enforceability of a given contract because of its non-compliance with the necessary formalities. A contract which does not conform to the statutory requirements is unenforceable by either party. A claim on the basis of quantum meruit or the like can always be entertained.³ When the law requires that a certain transaction must be performed in a certain way, it can be performed only in that way and in no other. A lease not executed in the manner provided in Section 47 of the Punjab Municipal Act, 1911 was held not binding on the New Delhi Municipal Committee. It conveyed no right to the person who claimed to be the lessee.⁴

The fact that the principal agreement was in accordance with Section 42(2) of the Act did not obviate the necessity of the suretyship agreement from complying with the provisions of Section 42 (2). But though such an agreement was void, the party receiving benefit thereunder must restore the same under Section 65 of the Contract Act.⁵

Section 175 (3) of the Government of India Act, 1935, was mandatory. Contracts not strictly in accord with Section 175 (3) might however by ratification by a proper authority become binding upon the Government. A strict evidence of such ratification would be necessary to make the contract binding on the Government. The fact that certain payment towards the alleged contract was made, possibly from the local treasury, did not prove ratification by the Government when it is not shown that the payment was sanctioned by the Government.⁶

Restoration of advantages under a contract discovered to be void.—See *Restitution* under Section 64, *supra*. Section 65 contains principle of restitution after benefit had been received, though the agreement was

1. See also *Municipal Board, Lucknow v. S. C. Deb*, (F.B.) 9 O.W.N. 461. Cases like *Radha Krishna v. Municipal Board of Benares*, (1905) 27 All. 592 can now be ignored.

2. *Province of W. B. v. Mohan Lal*, A.I.R. 1961 Cal. 663.

3. *Corporation of Madras v. Kothandapani*, (I.B.) A.I.R. 1955 Mad. 82; *Abaji Sitaram v. Trimbak Municipality*, (1904) 28 Bom. 66.

4. *New Delhi Municipal Committee v. Rikhy*, A.I.R. 1956 Punjab 181.

5. *Bhumbo Metharam v. District Local Board*, A.I.R. 1940 Sind 199.

6. *Province of West Bengal v. Mohan Lal*, A.I.R. 1961 Cal. 663.

later discovered to be not enforceable by law.¹ The principles underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter contractual deligation.²

Section 65 contemplates something different from Section 73. It contemplates the refund of any advantage which a party has received under an agreement which is discovered to be void or when a contract becomes void. The advantage received can either be restored in the form in which it was received or its equivalent can be awarded to the other party by way of compensation. It contemplates only refund of what one has received and does not contemplate the payment of damages to make up for the loss which the party not at fault has suffered on account of the other's committing a breach of the contract.³

Section 65 confers a right of restitution when a contract is discovered to be void. A party who has received any advantage under such a contract is bound to restore it to the other. The doctrine of restitution in integrum is of general application and underlines the provisions of Section 65. The object of Section 65 is not to make a new contract between the parties when the contract entered into between them has been discovered to be void but only to restore the advantage received by one party thereunder to the other. Unless a Court can restore the parties to their original position, having regard to the circumstances of each case, there is no scope for the application of Section 65.⁴ Section 65 confers a right of restitution in cases where the contract is unperformed and has no application where the parties cannot be restored to their original position. There should be *restitutio integrum* in order to invoke Section 65.⁵

Where the incapacity is in relation to the property and not a general incapacity of contract, then even if a contract is *ab initio* void, Section 65 will come into operation.⁶ Where however there is utter want of capacity to contract, the case will be a different one.⁷ Where a mortgage was discovered to have been void Section 65 applied.⁸ Where a subsequent mortgage was found to be void for the want of the necessary permission of the Collector, it fell within the words "discovered to be void" in Section 65 of the Contract Act, and the personal liability of the mortgagor under the said void mortgage for the money actually paid could be enforced.⁹

1. *Dominion of India v. Preety Kumar*, A.I.R. 1958 Pat. 203.

2. *Mohan Manucha v. Munzoor Ahmad*, 70 I.A. 1 : A.I.R. 1943 P.C. 29 ; *Pallonjee Eduljee v. Lonavala City Municipality*, [1937] Bom. 782.

3. *Sheo Kumar v. Gyan Nath*, A.I.R. 1955 All. 408.

4. *Krishnamurthi & Co. v. Seetharamayya*, A.I.R. 1958 Andhra 427.

5. *Gurunadha v. Rosiah*, A.I.R. 1959 Andhra 277.

6. *Abhi Singh v. Daso Bhogta*, A.I.R. 1952 Patna 455. *Harnath v. Indar Bahadur*, 50 I.A. 19 : A.I.R. 1922 P.C. 403.

7. *Mohori Bibee v. Dhurmodas Ghose*, 30 Cal. 539 : 30 I.A. 114 P.C.

8. *Ghulam Dastgir v. Nur Ali*, A.I.R. 1935 Lah. 401. *Thaker Ganpat v. Sukhran*, A.I.R. 1955 J. & K. 20. *Kuber v. Ramchandra*, 159 I.C. 19 : A.I.R. 1936 All. 215.

9. *Nisar Ahmad v. Mohan Manucha*, A.I.R. 1940 P.C. 204.

The principle underlying Section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. The incapacity imposed on a judgment-debtor by para. 11 of Schedule 3 of the Code of Civil Procedure, being an incapacity to affect his property and not a general incapacity to contract, the covenant to repay is not made void by the mere operation of the paragraph. But the lender who has agreed to make a loan upon security and has paid the money, is not obliged to continue the loan as an unsecured advance. If the bottom has fallen out of the contract, he may avoid it. If he does so avoid the contract, he brings himself within the terms of Section 65 and within the principle of restitution. A mortgage of property which was under the control of the Collector under Schedule 3, para. 11 was an open and honest transaction and its invalidity was at the time obscured by the difficulty in applying para. 11 of Schedule 3 correctly to the particular facts of the execution proceeding and to the terms of the orders as recorded. For ten years payments of interest were made and received thereunder. In the circumstances it was held that the security was not discovered to be void until after the suit was instituted upon the mortgage and in such suit the lender should be granted relief under Section 65 on the principle that where a defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder. The Collector directed that certain villages be sold in lots and the sale be stayed when the decretal amount was satisfied. The sale officer sold only two villages and on fetching required amount the other villages were discharged from sale. One of the exempted villages was then mortgaged without the permission of the Collector. The execution sale was however ultimately cancelled under Order 21, Rule 89. It was held that the mortgage though open, honest and reasonable transaction was invalid, the property being under the control of the Collector under para. 11 till the auction sale was cancelled on payment under Order 21, Rule 89.¹

Where an *ultra vires* issue of share has been made, the subscribers are entitled to get their money back, but this does not justify the claim of one, who has sold her shares, at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration.²

Where *sajadanashin* entered into agreement to lease the property of the *Khankah* and received *nazarana* for the same and after him a receiver was appointed who was sued for the return of the *nazarana* and the *nazarana* was found to be in the possession of the *khankah* it was held that the terms of Section 65 applied and the receiver was bound to return the amount received under the void agreement and that no privity of contract between him and the *sajadanashin* was necessary.³

1. *Mohan Manucha v. Manzoor Ahmad*, A.I.R. 1943 P.C. 29.

2. *Margaret Linz v. Electric Wire Co.* (case from Palestine), A.I.R. 1949 P.C. 51.

3. *Debi Prasad v. Mehdi Hasan*, A.I.R. 1940 Patna 81.

When the agreement was found or rather discovered to be void within the meaning of Section 65, as a matter of legal inference as also of natural justice, the consideration should be refunded.¹ Where the vendor was incompetent to transfer the property under Collector's management, Section 65 applied.² Where a sale of land by a Bhogta to a non-scheduled caste person failed by reason of Section 46 of the Chota Nagpur Tenancy Act, 1908, Section 65 of the Contract Act applied and the vendee was entitled to get back the money paid by him as consideration for the sale.³ An agreement to lease was not registered though registration was compulsory under law. On the refusal of specific performance on the basis of such a document consideration was held refundable on the basis money had and received.⁴

Where under a champertous agreement, found to be void, one of the parties is proved to have spent some amount from his pocket, for the litigation, including Court expenses, the other party is bound under Section 65 to restore the advantage of the amount to the first party. Section 65 does not lay down that the person receiving advantage is not only bound to restore that advantage but also pay further compensation. It allows compensation to be awarded only in the alternative when the advantage received by a person cannot be restored to the person from whom it had been received.⁵

Under Sections 4 and 30 of the Partnership Act, 1932, there must be a firm in existence before a minor could be included in it. Under Section 4 it is necessary that there must be an agreement between two or more adults before a partnership comes into being and it is only thereafter that a minor can be admitted to the benefits of partnership under Section 30 (1). Where therefore a partnership is purported to have been entered into by one adult with five minors, such a partnership is void and cannot be the basis of a suit for dissolution and accounts. Nor can the minors be regarded as admitted to the benefits of a partnership under Section 30 (1), as there is no partnership in existence. The minor partners are however entitled to recover their contribution to the partnership, under Section 65 of the Contract Act, with interest thereon.⁶

It is doubtful whether Section 65 applies when the agreement is discovered to be partly void.⁷ See under Section 56, *ante*. Advance freight when paid can be recovered by the shipper on the frustration of the venture.⁸ Section 65 applies only to a case where the agreement is discovered to be void or when a contract becomes void. The party claiming restitution should establish that he was not aware of the nature of the contract at the time when he entered into it. It could not come into operation in a case where the contract

1. *Bijay Singh v. Bhawani Singh*, A.I.R. 1953 All. 365.
2. *Saraswatibai v. Madhukar*, A.I.R. 1950 Nag. 229.
3. *Abhi Singh v. Daso Bhogta*, A.I.R. 1952 Patna 455.
4. *Balram v. Mahadeo*, A.I.R. 1949 Nagpur 389.
5. *Suganchand v. Balchand*, A.I.R. 1957 Raj. 89.
6. *A. Khan v. Ameer Khan*, A.I.R. 1952 Mysore 131.
7. *Kalka v. Badri Singh*, A.I.R. 1947 Oudh 33.
8. *Gandha v. Janoo*, A.I.R. 1926 Mad. 175.

was entered into with the knowledge that it was a void contract.¹ In a case of a void contract under Section 23, restitution will be allowed on the ground of public policy of the law.²

Becomes void.—"Becomes void" means becomes unenforceable. A contract becomes void also when a party has rightfully rescinded it. See illustration (b). For the purpose of Section 65, a contract becomes void when it becomes unenforceable. Thus where the terms of an agreement to sell were not satisfactorily proved and no decree for specific performance could therefore be made, the purchaser was entitled to recover the money which he had paid under the agreement.³ Section 65 applies to agreements which have been void from their inception as well as to contracts which become void subsequent to their making.⁴

Where the transaction is of sale of shares and the purchaser has paid the purchase price to the seller while the seller refused to deliver the goods agreed to be sold the purchaser on cancelling the bargain is plainly entitled to recover the money he had so paid. It makes no difference whether the price had been paid to the seller direct or to third person by his direction. If the transaction is a loan and the borrower agreed to borrow money on the security of shares which he undertook to deliver to the lender but refused to deliver then, the lender in cancelling the transaction is entitled to recover the money which he has advanced.⁵

Where the vender contracted to deliver possession of the premises to the purchaser within six months, but due to his default and delay, he was not able to give delivery within time, the vender could not repudiate the contract if time was not of the essence of the contract. Section 65 was therefore not applicable.⁶ If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to damages for breach of contract, but is entitled to a repayment of the advance made by him.⁷ Frustration of a given contract attracts Section 65.⁸

Advantages received under a contract that becomes void.—A contract though enforceable at the time of its formation may subsequently become void, that is, unenforceable in law, Section 65 provides that a party who has received any advantage under such contract is bound to restore it or to make compensation for it to the party from whom he received it. See illustrations (b), (c) and (d).

1. *Gurunadha v. Rosiah*, A I R. 1959 Andhra 277.

2. *Laxmidas v. Jyotsnaben*, A.I.R. 1954 Kutch 7.

3. *Amma Bibi v. Udit Narain*, (1909) 31 All. 68 P.C.

4. *Asaram v. Ludheshwar*, (F.B.) A.I.R. 1938 Nag. 335.

5. *Societe Belge de Banque v. Girdhari Lal*, A.I.R. 1940 P.C. 90.

6. *Arun v. Tulsi*, A.I.R. 1949 Cal. 510.

7. *Anantha Rao v. Surayya*, (1920) 43 Mad. 703.

8. *Manasseh Film Co. v. Gemini Picture Circuit*, A.I.R. 1944 Mad. 239, *Gandha v. Janoo*, A.I.R. 1926 Mad. 175. *Guridarshan v. Bishan*, (F.B.) A.I.R. 1963 Punj. 49.

When a contract becomes void, the plaintiff as a person who has received advantage; is bound to restore that advantage or make compensation for it under Section 65 of the Contract Act.¹ Where a contract becomes void the principle embodied in Section 65 comes into play and a party who has reaped benefit under the Contract has to restore it to the other party. The principle applies also to a case where the contract becomes void by frustration under Section 65.² Where a property in which the judgment-debtor has no saleable interest has been purchased in execution of a decree, the auction-purchaser is entitled to bring a suit for purchase money if he can bring himself within the equitable principles which justify a suit for money had and received on the ground that it is unconscionable that the defendant should retain the money as against the plaintiff.³

The defendant let to the plaintiffs two compartments in a godown each for twelve months. After six months, without any default of the plaintiffs the whole godown including the said two compartments was destroyed by fire. The plaintiff were entitled to a refund of a proportionate part of the money paid in advance to the defendant.⁴ When an agreement was decreed ineffectual, the debtor having previously received an advantage under it, was made liable to restore that advantage or to make compensation for it.⁵ The plaintiff purchased water pipes from the defendant and paid full price for them. The goods purchased were taken away by police as stolen goods, and handed over to the P.W.D. authorities. The plaintiff was entitled to recover back the purchase-money paid by him as there had been a total failure of consideration.⁶ If there was a completed contract which existed before the execution of the promissory note, an action would be on such a contract even though the promissory note executed subsequently cannot be admitted in evidence for any reason. Where the promissory note had become void on account of material alteration and the Court found passing of consideration and the execution of promissory note simultaneous, provisions of Section 65 cannot be invoked.⁷ By the mere fact that the right to enforce specific performance of the contract has become barred, the contract does not become void as it has ceased to be enforceable. The provisions of Section 65 of the Contract Act do not apply in such a case.⁸

Compensation for advantage received under a contract that becomes void.—Even where a contract was enforceable at the time of its

1. *Lachmi Prasad v. Lachmi Narain*, A.I.R. 1928 All. 41.

2. *Hari Singh v. Dewani Vidawati*, A.I.R. 1963 J. and K. 91.

3. *State v. Padmanabhan*, A.I.R. 1956 T.C. 216.

4. *Dhuramsey v. Ahmedbhai*, (1899) 23 Bom. 15.

5. *Basu Kaur v. Dhum Singh*, (1889) 11 All. 47.

6. *Chiranjil Lal v. Hans Raj*, A.I.R. 1961 Punj. 437.

7. *Rangaswami v. Doraiswami*, A.I.R. 1957 Mad. 715. *Govindaswami v. Kuppuswami*, (1889) I.L.R. 12 Mad. 239 applied, and A.I.R. 1940 Mad. 62 overruled.

8. *Venkatappa v. Chennappa*, A.I.R. 1945 Mad. 171. *Mahanth Singh v. U Ba Yi*, A.I.R. 1939 P.C. 110 : 66 I.A. 189 : 181 I.C. 1.

making but subsequently it became void, a party having received any advantage from the other party is required under Section 65 to restore the advantage to the latter. In case restoration is not possible he will have to make compensation for it to the person from whom he received the advantage. See illustrations (b), (c) and (d).

Where a party has rightfully rescinded the transaction without delay he would be entitled in equity to an account of the profits upon the principle of *restitution in integrum*.¹ Compensation is different from restitution. In certain cases, to award compensation would be directly enforcing a void contract.² Where the defendant had a lien upon the land for the amount of the mortgage debt which he had paid, the plaintiff could not set aside the sale to the defendant without refunding the amount secured by the lien.³ Where under the original contract one party has advanced some money to the other and the contract is subsequently varied by consent of parties the latter must, in the absence of any agreement to the contrary, return the sum to the former, call it money had and received or money held by one to the use of the other or money due on failure of consideration. To such a case Section 39 or Section 64 is not applicable.⁴ Where after the suit for specific performance was decreed by the lower Court the rights of the property sold themselves came to an end and vested in the State under the Zamindari Abolition and Land Reforms Act, in any appeal from the decree passed by the lower Court it was held that the contract of which specific performance was sought must be deemed to have become void and that refund of the earnest money and compensation by way of damages would be an appropriate relief to be granted to the plaintiff.⁵

Assessment of value.—As to assessment of value for the purpose of Section 65, see *Govindram Seksaria v. Edward Radbone*, (1947) 74 I.A. 295 : [1947] Bom. 860 : (1948) 50 Bom. L.R. 561 : A.I.R. 1948 P.C. 56.

Frustration and Section 65.—Section 56 provides for contingency. Where the very foundation of a contract has been taken away and the contract becomes impossible of performance, the defendant is bound to refund to the plaintiff the value of the goods received by him.⁶ The claim of a party who has paid money under a contract, to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances the law gives a remedy in quasi-contract to the party who has not got what he has bargained for. Although, in the formation of a contract, a promise to do a thing may be the consideration, in dealing with the law of failure and the right to recover money on that ground, it is, generally speaking,

1. *Satgur Prasad v. Har Narain*, (1932) 7 Luck. 64 P.C.

2. *Laxmidas v. Jyotsnaben*, A.I.R. 1954 Kutch. 7.

3. *Kuarji v. Moti Harida*, (1879) 3 Bom. 234.

4. *Rameshwarlal v. Bezonji Bariorji*, A.I.R. 1950 Cal. 236.

5. *Munshi Lal v. Vishnu Das*, A.I.R. 1954 All. 450.

6. *Babulal v. Vijaya Stores*, A.I.R. 1955 Orissa 49.

not the promise which is referred to as the consideration, but its performance.¹ The rule in *Chandler v. Webster*, [1904] 1 K.B. 493 : 12 Digest 407 : 73 L.J. K.B. 401 : 90 L.T. 217, that upon the frustration of a contract, the loss lies where it falls had prevailed since the decision of that case in 1904, though it had been constantly and severely criticised. The decision, however, had always been treated as not binding on the House of Lords and it was open to the House to review it. *Chandler v. Webster*, was therefore overruled in *Jibrosa Spolka Akcyjna v. Fairbairn Lawson*, [1943] A.C. 32 : [1942] 2 All E.R. 122 H.L. (F.).

As the learned editor of the All E.R., [1942] 2 All E.R. 122 H.L., points out the only sums recoverable are those paid for a consideration which has wholly failed. A partial failure of consideration is insufficient except in the case where the contract is severable and there has been a total failure of consideration as to one or more of the severed parts. English law does not provide for restitution and, therefore, the sum recovered in such a case is not subject to any deduction in respect of part-performance of the contract upon the part of the other party thereto. The result is not completely just in a pecuniary sense, observes the learned editor, nor ideally perfect as part of an equitable system of law. It can be made so only by legislation and the (English) Law Revision Committee has recommended an amendment of the law in this respect.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Mode of communicating or revoking rescission of voidable contract.

Communication of rescission of voidable contract.—When a contract is voidable and the party at whose option it is voidable seeks to rescind it he can do it in the same manner and according to the same rules as apply in the matter of communication of a proposal under Section 3 and 4 *ante*. The communication of the desire of rescission of a voidable contract is governed by the same rules as the communication of a proposal made with a view to making a binding agreement.

Revocation of rescission of voidable contract.—A party at whose option a contract is voidable may decide to rescind the contract and communicate his desire of rescission accordingly. Once having communicated his desire to rescind the given contract, he may again decide to revoke his rescission. In the matter of revocation of rescission he will be governed by the same rules as are applicable to revocation of a proposal under Section 3, 4, 5 and 6, *ante*.

Section 19 of the Contract Act does not require that an agreement shall be rescinded in a particular form, and all that Section 66 provides for is that the rescission of a voidable contract may be communicated or revoked

1. *Jibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 : [1942] 2 All E.R. 122 H.L.

in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.¹

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

Illustration

A contracts with *B* to repair *B*'s house. *B* neglects or refuses to point out to *A* the places in which his house requires repair. *A* is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Promisors duty to promisee.—Section 67 requires the promisee to afford the promisor reasonable facilities for the performance of his promise. Where the failure of performance has been caused by the promisee's neglect or refusal, the promisor will be excused. See the illustration to the Section.

Reasonable facilities.—Reasonable facilities are questions of fact depending great measure on the state of things and circumstances concerned. "When you speak of giving 'reasonable facilities' you imply that the thing with regard to which you order a facility is an existing thing."² Reasonable facilities under Section 67 not only include facilities as are deemed essential as the bases of the performance but also the maintenance of conditions which the promisee having sufficient powers is expected in law to afford to the promisor for a due performance of his promise. Thus the provision of sufficient space or other arrangements may be deemed a reasonable facility. 'Reasonable' refers to normal expectations. What is a necessary facility is, again, an issue of construction.³ What is reasonable is a question of fact, not law.

Neglect to afford reasonable facilities.—To "neglect doing, is the omission to do some Duty which the party is able to do"⁴. Ability is implied in "neglect".⁵

Refusal to afford reasonable facilities.—Refusal implies a conscious act of volition.⁶ Refusal or neglect involves the exercise of legal discretion; hence they do not apply to an infant.⁷ Also, there is refusal, where one has, by law, a right and power of having or doing something of advantage.

1. *Official Receiver v. Jugal Kishore*, (F.B.) A.I.R. 1963 All. 459.

2. *Darlaston v London and N. W. Ry.*, [1894] 2 Q.B. 694.

3. *South Eastern Ry. v. Ry. Comrs.*, 6 Q.B.D. 586. *West Ham v. Great Eastern Ry.*, 64 L.J. Q.B. 340. *Metropolitan Water Board v. London, Brighton and South Coast Ry.* [1910] 2 K.B. 890.

4. *King v. Burrell*, 12 A. and E. 468.

5. *R. v. Ryland*, L.R. 1 C.C.R. 99.

6. *Re Quintin Dick*, [1926] 1 Ch. 992.

7. *Re Edwards*, [1910] 1 Ch. 541.

Errata

At Page 41, in the illustration to Section 124, for 'This a contract.' read 'This is a contract.'

At page 80, in note 2., for 'Memoire' read 'Memoirs'.

At page 134, in the last but one line, for 'Sea Customs Act, 9878' read 'Sea Customs Act, 1878'.

At page 183, in the tenth line, for 'Taxicable' read 'taxicab'.

At page 184, in note 5, for 'Treatise an the Law' read 'Treatise on the Law'.

At page 228, in the last but one line, for 'that' read 'That'.

At page 240, in note 1., for 'Specific Act, read 'Specific Relief Act'.

At page 251, in note 2., for 'Salder Legal Aspects' read 'Salder, Legal Aspects'.

At page 315, in the last but two line, for 'require' read 'acquire'.

At page 351, in the seventeenth line, for 'shall man' read 'shall mean'.

At page 357, in the last but seven line, for '365. See' read '365. See'

At page 386, in note 5., for 'Howard [1963] *Muskham, Finance, Ltd. v.* read '*Muskham Finance Ltd. v Howard*, [1963]'

At page 418, in note 2, for '29 W. R. v. 569' read '29 W. R. 569'.

At page 434, in note 1., for 'Cheshire and Fitfood' read 'Cheshire and Fifool'.

At page 448, in note 7, for '[1965] 3 All E. R. marriage' read '[1963] 3 All E. R. 124 (marriage)'

At page 453, left-hand corner, for 'S. 23]' read 'S. 32]'.

At page 470, in the last but two line, for 'A.I.R. 924 Bom.' read 'A.I.R. 1924 Bom.'

At page 503, in the last but four line, for 'carried on the strength, read 'carried on the strength'.

At page 506, in note 9., for 'Surasalbalini' read 'Surasabalini'.

At page 531, in the last but one line, for 'Kahan' read '7. Kahan'.

At page 551, in the seventeenth line, for 'Petroleum' read 'Petroleum'.

At the same page, in the eighteenth line, for '[1965] 2 All E.R. 933. *Petrofina v. Martin*, read '[1965] 2 All E.R. 933 and *Petrofina v. Martin*,'.

At page 552, in note 1., for 'Kores' read 'Kores'.

At page 576, in the ninth line, for 'Sate of Punjab' read 'State of Punjab'.

At page 585, left-hand corner, for 'S. 23]' read 'S. 30]'.

At page 600, in the seventeenth line, for '(marine' read '(marine)'.

At page 603, in the twentyfirst line, for 'satisfied' read 'ratified'.

At page 637, in the thirteenth line, for 'respondent superior' read 'respondent superior'.

At page 662, in the last but one line, for 'post' read 'vol. 2'.

At page 687, in the twentyfirst line, for '(deceased)' read '(deceased)'.

At page 735, for the head line, read 'DEFAULT AS TO FIRST PERFORMABLE PROMISE'.

At page 737, in the head-line, after the word 'PERFORMABLE', add the word 'PROMISE'

At page 740, in footnote 1., for 'Hansbury' read 'Hanbury'.

At page 741, in footnote 1., in the last but one line, for '*Samsashtra*, read '*Saurashtra*'.

At page 743, in the sixteenth line, for 'more', read 'mere'.

At page 745, in the head-line, for 'CONTRACT', read 'ESSENCE OF CONTRACT'.

At page 745, footnote 6., for 'L.J.J.,' read 'L. JJ. '

At page 746, in the tenth line, for 'I. J.J.' read 'L.JJ.'.

At the same page, in footnote 1., for 'Meus' read 'Mews'.

At page 747, in the head-line, for 'CONTRACT', read 'ESSENCE OF CONTRACT'.

At page 763, anticipate the fourth paragraph of page 785, namely, "*Time of essence and frustration.*—As it has been observed... have been performed". as the fourth paragraph of page 763.

At page 768, in the last but two line, for 'Lordship' read 'Lordships'.

At page 769, the head-line should read 'INDIAN CONTRACT ACT AND ENGLISH COMMON LAW OF FRUSTRATION'.

At the same page, in the last but one line, for 'is rationable'. read 'in rationale'.

At page 770, in the seventh line, for '*per curim*', read '*per curium*'.

At page 785, in the fourth paragraph, namely, '*Time of essence and frustration.*—As it has been observed... have been performed', should be treated as deleted from the said page and transposed as the fourth paragraph of page 763.

At pages 785, 787, 789, 791, 793, and 795, the head-line should read 'PROMISE BECOMING IMPOSSIBLE' *vide* the one inserted.

At page 796, in footnote, 3., for 'Akeyjna' read 'Akcyjna' and for 'Lamson' read 'Lawson'.

At page 815, in the head-line, 'NOT' should be read as 'NEED NOT'; and in the marginal note to Section 62, 'not' should be read as 'need not'.

At page 849, in the marginal note to Section 64, for 'avoidable' read 'a voidable'.

At page 855, in the fourteenth line, for '*in pari delicto*' read '*in pari delicto*'.

At page 857, in footnote 5., 'v. Mansukhram' should be deleted, and 'Jharia' should be read for 'Jhari'.

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N. B. For a consolidated Index for volumes I and II, see vol. II.

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